No. 403

Office-Supreme Court, U.S.
FILED
1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 42,480

MISSISSIPPI POWER & LIGHT COMPANY, MISSISSIPPI MUNICIPAL ASSOCIATION AND CITY OF CLINTON,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

No. 42,535

MISSISSIPPI POWER & LIGHT COMPANY AND MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

JURISDICTIONAL STATEMENT

WISE, SMITH & CARTER,
Electric Building,
Jackson, Mississippi,
FRED B. SMITH,
Ripley, Mississippi,
GREEN, GREEN & CHENEY,
Electric Building,
Jackson, Mississippi,
Of Counsel.
CHARLES C. JACOBS, JR.,
Commerce Building,
Cleveland, Mississippi.
E. W. STENNETT,
Barnett Building,
Jackson, Mississippi.

SHERWOOD W. WISE,
FRED B. SMITH,
GARNER W. GREEN,
JOSHUA GREEN,
Attorneys for Mississippi Power & Light Company.

CHARLES C. JACOBS, JR.,
Attorney for Mississippi Municipal Association.
E. W. STENNETT,
Attorney for City of Clinton, Mississippi.

INDEX

Jurisdictional Statement 1

Opinions Below 3

Jurisdiction 3

Questions Presented 6

Statement of the Case 7

The Questions Are Substantial 13

A. The Contract Clause 13

B. Violation of Fourteenth Amendment, Both Due Process and Equal Protection 24

Proof of Service 41

Appendix 1-A—Delta Opinion A1

Appendix 1-B—Capital Opinion A21

Appendix 1-C—Chancellor's Opinion—Delta A35

Appendix 1-D—Chancellor's Opinion—Capital A37

Appendix 2—Section 3375, Mississippi Code of 1942 now Section 3374-02, Recompiled Mississippi Code of 1942) A38

Appendix 3—Section 3376, Mississippi Code of 1942 (now Section 3374-10, Recompiled Mississippi Code of 1942) A39

Appendix 4—Sections 7716-01, *et seq.*, Recompiled Mississippi Code of 1942 (especially Sections 7716-05, 7716-05(b) and 7716-38) A41

Appendix 5—Section 88, Mississippi Constitution A46

Appendix 5-A—Section 2780, Recompiled Mississippi Code of 1942 ..... A47

Appendix 6—Franchise, Winona A47

Appendix 7—Street Lighting Contract, Winona A51

Appendix 8—Additional Authorities, Question I A55

CASES CITED

Abington School District v. *Schempp*, ... U.S. ....., 10 L. ed. 2d 844 37

Alabama Power Company v. *Ickes*, 302 U.S. 464, 82 L. ed. 374, approving *New Orleans, M. & T.R. Co.* v. *Ellerman*, 105 U.S. 166, 26 L. ed. 1015 ..... 20, 23, 38

Arizona v. *California*, ... U.S. ....., 10 L. ed. 2d 542 ..... 18, 32

Cafeteria Workers v. *McElroy*, 367 U.S. 886, 6 L. ed. 2d 1230 31

Capital Electric Power Association v. *Hinson*, 230 Miss. 311, 92 So.2d 867 37

Capital Electric Power Association v. *McGuffee*, 226 Miss. 227, 83 So.2d 837 37

Capital Electric Power Association v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So.2d 739 37

Capital Electric Power Association v. *Mississippi Power & Light Company*, ... Miss. ....., 150 So.2d 534 ..... 2, 3, 37

Chase National Bank v. *Norwalk*, 291 U.S. 431, 78 L. ed. 894 ..... 28, 31-32

Chicago, Burlington & Quincy R. Co. v. *Chicago*, 166 U.S. 226, 41 L. ed. 979, 17 S. Ct. 581 28

Chicago v. *Atchison, Topeka & Santa F. R. Co.*, 357 U.S. 77, 2 L. ed. 2d 1174, cited in *Hanson* v. *Denckla*, 357 U.S. 235, 2 L. ed. 2d 1283 37

City of Ellisville v. *State Highway Commission*, 186 Miss. 473, 191 So. 274 15

City of Wichita Falls, Tex., v. *Bowen*, 143 Tex. 45, 182 S.W.2d 695 154 A.L.R. 1434 (1944) 39

Clarke-Washington Electric Membership Corp. v. *Alabama Power Co.*, 272 Ala. 598, 133 So.2d 488 (1961) 39

Clay v. *Sun Insurance Office*, 363 U.S. 207, 4 L. ed. 2d 1170, 1177 19

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 48 L. ed. 1102 18

Coker v. *Wilkinson*, 142 Miss. 1, 106 So. 886 18

Commissioner of Internal Revenue v. *Church*, 335 U.S. 632, 687, 93 L. ed. 288, 321 36

Dartmouth College v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629 ..... 10, 11, 20
Delta Electric Power Association v. *Mississippi Power & Light Company*, Miss. , 149 So.2d 504 ..... 2, 3, 22, 37
Deneen v. *Houghton County St. Ry. Co.*, 150 Mich. 235 133 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907) 39
Detroit United Railway v. *Michigan*, 242 U.S. 238, 61 L. ed. 268 ..... 5, 20, 24, 28, 29
Duke Power Co. v. *Blue Ridge Electric Membership Corporation*, 253 N.C. 596, 117 S.E.2d 812, 37 PUR 3d 396 39
Duke Power Co. v. *Greenwood County*, 302 U.S. 485, 82 L. ed. 1240 38
East Hartford v. *Hartford Bridge Co.*, 10 How. 511, 13 L. ed. 518 21
Farmers Electric Co-op. Corp. v. *Arkansas Power & Light Co.*, 220 Ark. 652, 249 S.W.2d 837 (1952) 38-39
Fauntleroy v. *Lum*, 210 U.S 230, 52 L. ed. 1039 20
Fletcher v. *Peck*, 6 Cranch 87, 3 L. ed. 162 20
Gomillion v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110 21, 22
Ginsberg & Sons v. *Popkin*, 285 U.S. 204, 76 L. ed. 704 18
Griffith v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011 ..... 17, 18
Hannah v. *Larche*, 363 U.S. 420, 442, 4 L. ed. 2d 1307, 1321 31
Hansberry v. *Lee*, 311 U.S. 32, 85 L. ed. 22 ..... 28, 31
Hovey v. *Elliott*, 167 U.S. 409, 42 L. ed. 215 24, 32, 37
Inglehart v. *Inglehart*, 204 U.S. 478, 51 L. ed. 575 18
International Machinists v. *Street*, 357 U.S. 740, 749, 6 L. ed. 2d 1141, 1150 29
In the Matter of the Enlargement of the Municipal Boundaries of the City of Forest, Mississippi, Miss. , 153 So.2d 688 15
Jefferson Standard Life Ins. Co. v. *Noble*, 185 Miss. 360, 188 So. 289 38
Jones v. *Habersham*, 107 U.S. 174, 27 L. ed. 401 23

Keefe v. *Clark*, 322 U.S. 392, 88 L. ed. 1347 26
Light, Heat & Water Company v. *Jackson*, 73 Miss. 598, 19 So. 771 18
Lynch v. *Overhalser*, 369 U.S. 705, 8 L. ed. 2d 211 29
Metlakatla Indian Community v. *Egan*, 363 U.S. 555, 4 L. ed. 2d 1397 4
Middleton v. *Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956 23
Mississippi Power & Light Co. v. *Town of Coldwater*, D.C. Miss., 168 F. Supp. 463 ..... 11 25-26
Mississippi Power Company v. *East Mississippi Electric Power Association*, 244 Miss. 40, 140 So.2d 286 37
New Orleans v. *New Orleans Waterworks*, 142 U.S. 79, 35 L. ed. 943 21
New York v. *United States*, 326 U.S. 572, 90 L. ed. 326 38
Oliphant v. *The Carthage Bank*, 224 Miss. 386, 80 So.2d 63 22
Omaha Transit Co. v. *Briggs*, 167 Neb. 703, 94 N.W.2d 461, 28 PUR 3d 26 (1959) 39
Owens v. *Battenfield*, 33 F.2d 53, 280 U.S. 605, 74 L. ed. 649, 50 S. Ct. 88 28
Owensboro v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389 ..... 10, 22
Pacific Tel. & Tel. Co. v. *City of Los Angeles*, 44 Cal. 2d 272, 282 P.2d 36 17
Payne v. *Jackson City Lines*, 220 Miss. 180, 70 So.2d 520 22
Pee Dee Electric Membership Corporation v. *Carolina Power & Light Company*, 253 N.C. 610, 117 S.E.2d 764, 37 PUR 3d 387; 256 N.C. 56, 122 S.E. 761 39
People ex rel. Woodhaven Gaslight Co. v. *Deehan*, 153 N.Y. 528, 533 8
Perry v. *United States*, 294 U.S. 330, 79 L. Ed. 912 38
Planters Bank v. *Sharp*, 6 How. 301, 12 L. ed. 447 ..... 5, 11, 24, 27, 28
Public Service Co. v. *Public Utility Comm. of Colorado*, 142 Colo. 135, 350 P.2d 543 (1960) 39
Reid v. *Trowbridge*, 78 Miss. 542, 29 So. 167 ..... 17, 18

Rosehill Cemetery Co. v. *City of Chicago*, 352 Ill. 11, 185 N.E. 170, 87 A.L.R. 742 (1933) 39
Rosenberg v. *Fleuti*, ... U.S. ....., 10 L. ed. 2d 1000, 1002, 1003, 1009 ..... 19, 36
Russell v. *Sebastian*, (1914) 233 U.S. 195, 209, 34 S. Ct. 517, 58 L. ed. 912, 923 ..... 8, 14, 39
Scott v. *McNeal*, 154 U.S. 34, 14 S. Ct. 1108, 38 L. ed. 896 28
Seattle Lighting Co. v. *City of Seattle*, 54 Wash. 9, 102 P. 767 15
Southern Bell Telephone & Telegraph Co. v. *City of Meridian*, (1961) 241 Miss. 678, 131 So.2d 666, 673 ..... 11, 39
South Carolina v. *United States*, 199 U.S. 437, 50 L. ed. 261 38
Stone v. *State of Mississippi*, 101 U.S. 814, 821, 25 L. ed. 1079 20
Superior Water, Light & Power Co. v. *Superior*, 263 U.S. 125, 68 L. ed. 204 ..... 5, 20, 24, 29
Tennessee Electric Power Co. v. *Tennessee Valley Authority*, 306 U.S. 118, 83 L. ed. 543 ..... 23, 38
Texas ex rel. Southwestern Gas & E. Co. v. *Upshur Rural Electrical Coop. Corp.*, (1957) 156 Tex. 633, 638, 18 PUR 3d 53, 57, 298 S.W.2d 805, 808 39
Town of Coushatta et al. v. *Valley Electric Membership Corporation*, (La. Appeals, 1962) 139 So.2d 822 39
Traverse City v. *Consumers Power Co.*, 340 Mich. 85, 64 N.W.2d 894 17
Trenton v. *New Jersey*, 262 U.S. 182, 67 L. ed. 937 21
Tulsa St. Ry. Co. v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 113 P. 180 17
Twin City Pipe Line Co. v. *Harding Glass Co.*, 283 U.S. 353, 73 L. ed. 1112 26
United States v. *Heinszen*, 206 U.S. 370, 51 L. ed. 1098 18
United States v. *Philadelphia National Bank*, ... U.S. ....., 10 L. ed. 2d 915, 935 36
United States v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765 ..... 19, 29

Vaughan v. *Swazie*, 56 Miss. 704 18
Vicksburg v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102 ..... 17, 18, 24, 30
Vicksburg v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155 ..... 5, 17, 13, 30
Vicksburg Waterworks Co. v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808 ..... 16, 18, 26, 30
Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. ed. 403 26
Wade v. *Colonization Society*, 7 Sm. & M. 663 23
Walla Walla v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341 5
West Bros. v. *Illinois C.R. Co.*, 222 Miss. 235, 75 So.2d 723 23
Whitaker v. *Louisville Transit Co.*, 274 S.W.2d 391 (Ky. 1954) 39
Willmut Gas & Oil Company v. *Covington County*, 221 Miss. 613, 71 So.2d 184, appeal dismissed, 348 U.S. 891, 99 L. ed. 700 22
Wisconsin Lbr. Co. v. *State*, 97 Miss. 571, 54 So. 247 26
Woodruff v. *State of Mississippi*, 162 U.S. 291, 40 L. ed. 973, 66 Miss. 298 ..... 5, 19, 28
Worcester v. *Worcester Consolidated Street R. Co.*, 196 U.S. 539, 49 L. ed. 591 21
Yazoo & M.V.R. Co. v. *Adams*, 81 Miss. 80, 32 So. 937 31

OTHER AUTHORITIES

13 *Am. & Eng. Anno. Cases* 137 16
37 *Am. Jur.*, "Municipal Corporations", Sec. 34, p. 651 15
46 *Am. Jur.*, "Sales", Sec. 158, p. 334 26
Annotation, 5 L. ed. 2d 1105, 1110 26
Ark. Laws 1955, Act No. 85 39
Ark. Laws 1957, Act No. 103 39
Broom's Legal Maxims, p. 594 21
Chapter 432, Title I, Section 4, 49 Stat. 1365 as amended (Title 7, U.S.C., Ch. 31, Section 901, *et seq.*) 7, 11, 32
52 *C.J.* 1149 38

62 C.J.S., "Municipal Corporations", Sec. 78, p. 186 15
66 C.J.S. 4 21
77 C.J.S., "Sales", Sec. 171, p. 906 26
80 Cong. Rec. 2752, 2755, 2758 33
80 Cong. Rec. 5283, 1936 34
80 Cong. Rec. 5308 34
McQuillin on Municipal Corporations, 3rd Ed., Vol. 5, Sec. 1530 15
Mississippi Code of 1924, Section 3406 5
Mississippi Code of 1942, Section 3375 5, 6, 8
Mississippi Code of 1942, Section 3376 5, 6, 9
Mississippi Constitution, Section 88, Appendix 5 5
Mississippi Constitution, Section 95 22
Opinion No. 4506, Hearings, Senate Subcommittee on Agriculture Appropriations for 1951, 81st Cong., 2nd Sess., p. 1378 34-35
Opinion No. 5247, November 3, 1948 35
Pond on Public Utilities, 4th Ed., Sec. 131, p. 316, *et seq.* 15
Public Service Commission Act, Ch. 5, Sections 7716-01, *et seq.* 9
Recompiled Mississippi Code of 1942, Section 2780 6, 22
Recompiled Mississippi Code of 1942, Section 3374-02 5, 6, 8
Recompiled Mississippi Code of 1942, Section 3374-10 5, 6, 9, 15
Recompiled Mississippi Code of 1942, Section 3374-120 5, 11
Recompiled Mississippi Code of 1942, Section 7716-01, *et seq.* 4, 5
Recompiled Mississippi Code of 1942, Section 7716-05(b) 4, 6, 9, 12, 25, 29
Recompiled Mississippi Code of 1942, Section 7716-38 7, 12, 29
Report of Hearings, pp. 2, 4 33
Senate Bill No. 3483 (75th Cong., 2nd Sess.) 32
Sen. Rep. No. 1581, 74th Cong., 2nd Sess. 33

Title 28, *U.S.C.*, Section 1257(2) 4
Title 28, *U.S.C.*, Section 2103 4
United States Constitution, Article I, Section X, Cl. 1 13
28 *U.S.C.*, Rule 15(3) 2
5 *Williston on Contracts* (Rev. Ed.), Sec. 1651A, p. 4646 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 42,480

MISSISSIPPI POWER & LIGHT COMPANY, MISSISSIPPI MUNICIPAL ASSOCIATION AND CITY OF CLINTON,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

No. 42,535

MISSISSIPPI POWER & LIGHT COMPANY AND MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

JURISDICTIONAL STATEMENT

The parties appellant in Cause No. 42,480 are Mississippi Power & Light Company (Appellant), Mississippi Municipal Association (Intervenor) and City of Clinton

(Intervenor). The parties appellant in Cause No. 42,535 are Mississippi Power & Light Company (Appellant) and Mississippi Municipal Association (Intervenor). In both causes, said Appellant and said Intervenors are collectively sometimes referred to as "Appellants".

Pursuant to Rule 15(3), 28 *U.S.C.*, the Appellants file a single statement because these two appeals are from the Supreme Court of the State of Mississippi in companion cases involving precisely similar constitutional questions, as was said in *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 149 So.2d 504, 513:

> "Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U. S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. * * *."

And in *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 150 So.2d 534, 541:

> "It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, cl. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case."

Appellants appeal from final judgments of the Supreme Court of Mississippi in favor of Delta Electric Power Asso-

ciation (Delta) on April 8, 1963, and Capital Electric Power Association (Capital) on April 15, 1963, denying Appellants' claim of contract impairment and denial of due process and equal protection. By this Statement, filed pursuant to Rule 13 and in conformity with Rule 15 of the Revised Rules of this Court, it will be shown that this Court has jurisdiction, and that the questions presented are substantial.

OPINIONS BELOW

The cases are not yet officially reported but appear thus: *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ____ Miss. ____, 149 So.2d 504, Suggestion of Error overruled without opinion; and *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ____ Miss. ____, 150 So.2d 534, Suggestion of Error overruled without opinion. The opinions are annexed hereto as Appendix 1-A and Appendix 1-B, respectively. The opinions of the Chancellors, reversed by the Supreme Court of Mississippi, are annexed hereto as Appendix 1-C and Appendix 1-D, respectively.

JURISDICTION

Delta and Capital, together called "Association" or "Associations", each severally instituted before the Mississippi Public Service Commission (Commission) an action to compel Appellant to cease to serve areas certificated to each Association and to remove therefrom Appellant's facilities installed pursuant to claimed constitutional rights. Appropriate relief being granted Associations, Appellants appealed to the Chancery Court of Hinds County, wherein the Commission was reversed. Thereupon, Associations ap-

pealed to the Mississippi Supreme Court, wherein the Chancery Court was reversed and the order of the Commission reinstated. Therefrom Appellants appeal to this Court.

The judgment in No. 42,535 (Delta) was entered on February 11, 1963, and became final on April 8, 1963, when Suggestion of Error was overruled. The Notice of Appeal was filed in the Supreme Court of Mississippi on May 24, 1963. On May 24, 1963, the Supreme Court of Mississippi enlarged the time for docketing the record on appeal to September 1, 1963.

The judgment in No. 42,480 (Capital) was entered on March 11, 1963, and became final on April 15, 1963, when Suggestion of Error was overruled. The Notice of Appeal was filed in the Supreme Court of Mississippi on May 24, 1963. On May 24, 1963, the Supreme Court of Mississippi enlarged the time for docketing the record on appeal to September 1, 1963.

Section 1257(2), Title 28, *U.S.C.*, confers on this Court jurisdiction of this appeal. Note Section 2103, Title 28, *U.S.C.*

Appellant claimed that its franchise and street lighting contracts were impaired by Section 7716-01, *et seq.*, *Recompiled Mississippi Code of 1942*. Mississippi's Court sustained the statute as valid and denied the relief demanded. Mississippi's Court is the highest court that may consider these questions. Review here, therefore, is allowed as of right. *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555, 4 L. ed. 2d 1397.

The following cases sustain the jurisdiction of this Court on direct appeal from the Supreme Court of Mississippi when that Court sustained as valid Section 7716-05(b), *Recompiled Mississippi Code of 1942*, and denied

constitutional rights: *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155; *Woodruff* v. *State*, 162 U.S. 291, 40 L. ed. 973; *Planters Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447; *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204; *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268; *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341.

The State statutes involved are:

1. Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*), Appendix 2 hereto, limited by Section 3406, *Mississippi Code of 1942* (now Section 3374-120, *Recompiled Mississippi Code of 1942*), empowering municipalities:

> "To grant any person or corporation the use of the streets, alleys, and public grounds for the purpose of laying gas, water, sewer, or steam pipes, or conduits for electric light, telegraph and telephone lines, to be used in furnishing or supplying the municipality and inhabitants, or any person or corporation, with gas, water, sewerage, steam, or hot air for heating purposes, or light; but a franchise, right of way, or privilege of any character whatever, shall not be granted for a longer period than twenty-five years, and such privilege shall not be exclusive."

2. Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*), Appendix 3 hereto.

3. Sections 7716-01, *et seq.*, *Recompiled Mississippi Code of 1942*, especially Sections 7716-05(b) and 7716-38, Appendix 4 hereto, herein called the "Act". This "Act" was first passed and became effective on March 29, 1956.

4. Section 88, *Mississippi Constitution*, Appendix 5 hereto.

5 Section 2780, Recompiled Mississippi Code of 1942, Appendix 5-A hereto.

QUESTIONS PRESENTED

I. Where a contractual franchise is duly granted by a municipality for twenty-five years to serve within its boundaries as they now are "or may hereafter be laid out or extended" and the franchised utility performs the franchise and makes investments in facilities to render service in the disputed area, may the State of Mississippi by the Public Service Commission Act impair the franchise contract by deleting "as they * * * may hereafter be laid out or extended", when the municipality had express power to extend or contract its boundaries under the law of the State? Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*). (The disputed area referred to is the territory annexed to the municipalities after the franchises were granted, as hereinafter set forth.)

II. Where a contract is duly entered into by a municipality with an electric utility to furnish all street lighting service required by the municipality, may the State of Mississippi by the Public Service Commission Act impair the contract by holding it ineffectual in the disputed area during the contract period, despite the Contract Clause and the Fourteenth Amendment? Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*).

III. Notwithstanding the Contract Clause and the Due Process Clause of the Federal Constitution, could the Act, by Section 7716-05(b), *Recompiled Mississippi Code of 1942*, and the certificate made pursuant thereto by the

Public Service Commission, confer upon Associations an exclusive electric franchise in the disputed area and take from Appellant that participation expressly vouchsafed by the non-exclusive provision therein before the expiration of its franchise wher , by Section 7716-38, *Recompiled Mississippi Code of 1942*, it was expressly provided:

> "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

IV. Was there not a denial of procedural due process under the Federal Constitution, Fourteenth Amendment?

V. By reason of Title 7, *U.S.C.*, Ch. 31, Section 901, *et seq.*, Ch. 432, Title I, Section 4, 49 Stat. 1365, as amended, and said loan to Associations, has Appellant justiciable rights against Association?

STATEMENT OF THE CASE

That presented is the classic case of impairment of the obligation of contract by state statute. The decisions of the Supreme Court of Mississippi upon these two test cases reach into every municipality in Mississippi—and elsewhere, if this precedent be followed—to strike down all municipal regulation of utility operation and to destroy the thousands of dollars invested on the faith of municipal franchises and contracts. The importance of these cases in Mississippi is evidenced by the intervention of the Mississippi Municipal Association, representing all

major municipalities in the State, and of the City of Clinton, Mississippi.

One of the great trends in our country's present development is municipal expansion. Growth in size and city planning are essential if the benefits of municipal government are to reach suburbia. The municipalities involved, for valuable consideration, granted twenty-five year franchises to the utility—the franchise had to be for a long enough time to justify the utility's initial investment for installing its plant and lines. *People ex rel. Woodhaven Gaslight Co.* v. *Deehan,* 153 N.Y. 528, 533, quoted with approval in *Russell* v. *Sebastian,* 233 U.S. 195, 209, 58 L. ed. 912, 923. Municipal planners foresaw growth and, therefore, obligated the utility to furnish service not only within the then boundaries of the municipalities but also as the same might be extended. The utility in performing its contract is shown by the record to have planned and developed its system so as to provide for growth into suburbia.

Appellant operates an electric utility system throughout the western half of the State of Mississippi and has been doing business in Winona and Clinton as such utility since before 1930, under municipal franchises.

The State of Mississippi, possessing plenary power statewide, delegated legislative power to Winona to "contract and be contracted with and exercise and perform all municipal powers and duties", Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*). On February 23, 1948, the State, acting through the Mayor and Board of Aldermen of Winona granted to Appellant a twenty-five year non-exclusive electric utility franchise within its boundaries "as they now exist or may hereafter be laid out or extended", said

franchise being Appendix "6" hereto. By Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*), the State fixed the limits wherein the franchise would be operative and Appellant was compelled, when it accepted this franchise, to leave vested in the State the right to expand or contract the municipal boundaries. When such expansion occurred, Appellant had contractually agreed to be bound thereby and correlatively was entitled to the non-exclusive rights in the disputed area.

A lawful addition was made to Winona on November 3, 1959. Upon March 29, 1956, the Public Service Commission Act, Ch. 5, Sections 7716-01, *et seq.*, and especially Section 7716-05(b), *Recompiled Mississippi Code of 1942*, became law and effective, pursuant whereto the Commission issued the certificate of convenience and necessity whereunder Delta was awarded by the State Supreme Court an exclusive state-granted franchise to the area annexed to Winona (herein called "disputed area" or "Area B"). But this construction of this statute, as to the constitutional rights of Appellants, is, with deference, most seriously challenged under Section 7716-38 thereof.

Appellant constructed certain electric facilities in the disputed area after November 3, 1959. Thereupon Association instituted before the Public Service Commission a cease and desist proceeding seeking to oust Appellant from the disputed area. The Mississippi Municipal Association became a party thereto and strenuously contended for the right of municipalities so to contract. Appellant interposed its franchise in its pleadings and evidence, and the Commission said:

"* * * We do not consider the municipal franchise granted Mississippi Power & Light Company by the

City of Winona to be germane to any of the issues in this cause. Therefore we have disregarded the franchise completely as we believe it has no bearing on the case. The Commission, however, does not decide or pass upon the validity of the franchise or attempt to interpret or construe its provisions. The Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Dockets No. U-44 and U-117. The first certificate does not include the disputed area. The second certificate does include the area in question."

And ordered:

"Mississippi Power & Light Company be and it is hereby commanded, required and ordered to cease and desist from offering any electric service or street lighting service in the newly annexed area to the City of Winona. * * *.

"Mississippi Power & Light Company be and it is hereby commanded, required and ordered to remove all of its electric lines and facilities which it has constructed and is now operating or maintaining within the disputed area * * *."

The Supreme Court thereasto said, 149 So.2d 513:

"Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. * * *."

The State reserved no unilateral power to exclude Appellant from the disputed area, which is essential under decisions of this Court. *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; *Dartmouth College*

v. *Woodward*, 4 Wheat. 518. 4 L. ed. 629, Story J. *Opinion; Planters' Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447. See *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666.

Upon February 23, 1948, the State, through the Mayor and Board of Aldermen of the City of Winona, as then was, contracted with Appellant that "Company will furnish and Municipality will take and pay for its entire lighting service during the term of this Agreement * * *", said contract being Appendix "7" hereto. Said contract, a typical total requirements contract, has never been cancelled and has been fully performed by Appellant. Compare *Mississippi Power & Light Co.* v. *Town of Coldwater*, D.C. Miss., 168 F. Supp. 463. But the State assumed to lift the disputed area out of its terms, thus confining the Appellant's right to serve to the original "now" limits.

The State of Mississippi, acting through its public agencies, the municipalities, had authorized electric franchises therein for a period of twenty-five years and had prohibited the granting of any exclusive franchises. Section 3374-120, *Recompiled Mississippi Code of 1942*.

The Public Service Commission declined to integrate into this cause the consideration of (a) the franchise and (b) the service contract and assumed to pass upon the Appellant's rights exclusively under the certificate of convenience and necessity; and substantially the Supreme Court affirmed this action with the State of Mississippi and Winona not before the Commission.

Under Chapter 432, Title I, Section 4, 49 Stat. 1365, as amended (Title 7, *U.S.C.*, Ch. 31, Section 901, *et seq.*), the Association borrowed from the United States at 2%, in part to construct its plant. But the United States, in

passing said Act, intended to protect Appellant. Under said Act, in accordance with the assurances given in Congress when the same was passed, the Association could not (a) operate in a municipality having more than 1500 inhabitants—Winona has nearly 4,000—nor (b) supply electricity where the consumers were receiving central station power, nor again, (c) directly furnish electricity to Winona. Appellant asserted its rights to be thereasagainst protected, having a franchise and a total requirements contract with said Winona, as hereinabove stated.

At Clinton, the municipal powers were the same as at Winona. The terms of the franchise and the street lighting contract were identical, save as to the dates (and therefore not appended). Annexations occurred at different times. The City of Clinton was a party to the proceeding before the Public Service Commission, in order to uphold its franchise and contract with Appellant, but the State, qua State, was not.

Under Section 7716-05(b), *Recompiled Mississippi Code of 1942*, as construed by Mississippi's Court herein, Appellant had its non-exclusive franchise as to the disputed area taken away pursuant to that Section, despite reliance upon the Constitution. The Supreme Court likewise took away the disputed area from Appellant's exclusive requirements contract solely in virtue of this Section.

Sections 7716-05(b) and 7716-38, *Recompiled Mississippi Code of 1942*, were erroneously construed by Mississippi's Supreme Court; and as construed, the statutes are rendered unconstitutional. Appropriate construction under the Federal Constitution is here requisite; and when so appropriately construed by this Court, neither the franchise nor the lighting contract will have been impaired,

but will persist until their contractual expiration, 1973 and 1971, respectively.

Appropriate appellate review is sought here.

THE QUESTIONS ARE SUBSTANTIAL

I.

These questions have been inserted, *supra*, and are not repeated here. To save prolixity, reference is respectfully made.

A.

The Contract Clause

1. The Contract Clause, *United States Constitution*, Article I, Section X, Cl. 1, provides:

> "1. No State shall * * * pass any * * * Law Impairing the Obligation of Contracts, * * *."

2. That segment of the contract whereasto impairment is claimed reads, in part (the full text being Appendix "6"):

> "SECTION 2. The Grantee is hereby further given and vested with *full right*, authority, easements, privilege and franchise to construct, re-construct, erect, suspend, install, renew, maintain, operate and conduct *in said municipality* a system of poles, towers, conduits, cables, conductors, transformers, fittings, and all appliances and appurtenances *now, or hereafter, during the life of this franchise*, necessary or desirable to the transmission, distribution and/or sale of electric current, for all purposes whatsoever, in, over, under, along, upon and across all streets, alleys, ways, bridges and public places and other municipal property *in said municipality, as they now exist, or may hereafter be laid out or extended*, together with

the further full right, privilege, easement, authority and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain and operate said poles, towers, conduits, cables, conductors, transformers, fittings and all other appliances and appurtenances *now or hereafter, during the life of this franchise, necessary or desirable for the transmission within, through and over and beyond said municipality, and to electricity consumers, both within and beyond the limits thereof,* electricity for lighting, heating, power and all other purposes for which electricity *may be now, or hereafter used, and for the purpose of extending its system beyond the limits of the municipality as they now may, or may hereafter exist.*" (Emphasis ours, unless otherwise noted).

3. The contract was dated February 23, 1948, and was then accepted and performance begun, approximately eight years prior to the enactment by the State of Mississippi of the statute which is now held to deprive Appellant of its rights thereunder. With deference, Mississippi's Court's conclusion is overwhelmed by *Russell* v. *Sebastian*, 233 U.S. 195, 58 L. ed. 912, where this Court said, after acceptance, the franchise was effective as an entirety "not foot by foot, as pipes were laid". The addition to Winona whereasto this controversy centers was lawfully made upon November 3, 1959. Assume concentric circles represent the former and present municipal boundaries. The inner circle, "A", will represent the municipal limits on February 23, 1948, whereasto there is no dispute; and "B" will represent the area between the circumference of the inner circle and the outer circle, the addition to the municipal limits made November 3, 1959. The disputed area, "B", was awarded by Mississippi's Court to Appellee under its certificate and Appellant confined to "A". To make the case clearer, assume that "A", whereto the Court has confined Appellant, is the old town wherein may be slums and absolutely no industrial load; in the extended

area "B", modern suburbia exists with large industrial loads.

Appellant has never contended that on November 2, 1959, Winona had full jurisdiction over the streets then not within the city; but it has contended that on February 23, 1948, it had legislative authority to grant a franchise to terminate on February 22, 1973. The State had given it a power to contract that when, if and after this addition to the boundaries was made upon November 3, 1959, the franchise *eo instanti* would become co-extensive with the addition, Area "B", under Section 3374-10, *Recompiled Mississippi Code of 1942. In the Matter of the Enlargement of the Municipal Boundaries of the City of Forest, Mississippi,* ..... Miss. ....., 153 So.2d 688. It would have been a deception to have granted power to make the franchise effectual until 1973 if the State had reserved to itself secretly the right to prohibit, after March 29, 1956, any addition lawfully made from becoming subject to the franchise.

The universal rule - - - until this decision - - - is that, in the absence of special provisions to the contrary - - - and there are none such here - - - all municipal ordinances and contracts of a general character automatically and simultaneously extend over and become operative in territory immediately upon its annexation to a city. Compare *City of Ellisville* v. *State Highway Commission,* 186 Miss. 473, 191 So. 274; 37 *Am. Jur.,* "Municipal Corporations", Sec. 34, p. 651; 62 *C.J.S.,* "Municipal Corporations", Sec. 78, p. 186; *McQuillin on Municipal Corporations,* 3rd Ed., Vol. 5, Sec. 1530; *Pond on Public Utilities,* 4th Ed., Sec. 131, p. 316, *et seq.* In *Seattle Lighting Co.* v. *City of Seattle,* 54 Wash. 9, 102 P. 767, it was said:

> "* * * It will be readily seen that the franchises above referred to were not confined to any particular

> streets or district within the city. The language is broad and clear. The grant is a general grant 'throughout the city of Seattle and throughout any addition thereto,' and 'as the boundaries thereof are or may hereafter be.' It is clear from the language here used that the city intended to grant the right throughout the whole city as it then was and as it might thereafter be extended. * * * . We think a reasonable construction of the language of the grant requires us to hold that the city intended the grant to be a general continuing one, expanding with the city, and not one limited to a particular district."

In 13 *Am. & Eng. Anno. Cases* 137, it is said:

> "A municipality has power to contract by ordinance that a franchise granted shall be in force in the corporate limits of the city as they exist at the time of the passage of the ordinance or as they may thereafter be enlarged, for, if the ordinances were silent as to the territory thereafter taken into the city, the meaning would be the same. Truesdale v. Newport, (Ky.) 90 S.W. 589."

It is passing strange that substantially the sole authority seized upon by the Supreme Court of Mississippi as a basis for its decision and as a means for eluding the constitutional questions was the above *Annotation*. That Court cited the above *Annotation* as holding directly contrary to that just quoted.

Compare *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808, wherein the same authority as was given to Winona was construed when Vicksburg had, through its Mayor and Board of Aldermen, enacted a franchise, containing, 185 U.S. 69:

> " 'Sec. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes ef-

> fect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, *and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction,* * * *.'"

The Supreme Court of Mississippi in *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167, and *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011, and this Court in *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102, and *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, without question held that where such a grant had been made by the Legislature and such an exercise of a power had by the municipality, the franchise as to "now or hereafter" was effective. We assert this as the universal rule. Compare *Pacific Tel. & Tel. Co.* v. *City of Los Angeles*, 44 Cal. 2d 272, 282 P.2d 36; *Traverse City* v. *Consumers Power Co.*, 340 Mich. 85, 64 N.W.2d 894; and in *Tulsa St. Ry. Co.* v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 113 P. 180, that Court said:

> "* * * Discussing this question in Seattle Lighting Co. v. City of Seattle et al., 54 Wash. 9, 102 Pac. 767, the Court said: '*Appellants also contend that the city had no power to grant a franchise without its corporate limits. It did not do so in this case.* The grant is confined to the city, and is effective within and not without the city limits. As soon as new territory is taken into the city, the grant immediately attaches without any further action on the part of the city.' Other cases in point, or the reasoning of which supports this doctrine, are: Truesdale v. City of Newport, 90 S.W. 589, 28 Ky. Law Rep. 840; * * *."

(a) The contract was validly granted by the State of Mississippi under plenary authority therefor precedently vouchsafed to the State's agency. Compare *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771; *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167; *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011; and especially *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; and *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155. Sp. *Arizona* v. *California*, ____ U.S. ____, 10 L. ed. 2d 542; *Cleveland* v. *Cleveland City R. Co.*, 194 U.S. 517, 48 L. ed. 1102; but *arguendo*, that the grant in part was without power;

(b) The Act, instead of taking away Appellants' rights, confirms them, in this, that Section 7716-05(b) alleged to have been emasculated is but a general provision and there is therein the last provision, Section 7716-38, whose express provision is:

> "* * * but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

United States v. *Heinszen*, 206 U.S. 370, 51 L. ed. 1098; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 76 L. ed. 704; *Vaughan* v. *Swazie*, 56 Miss. 704. While these two sections should be construed to harmonize, under our Court's interpretation, with deference, this may not be so. Accordingly until 1973, this last Section makes our rights dominant and those of the Appellee servient. *Coker* v. *Wilkinson*, 142 Miss. 1, 106 So. 886; *Inglehart* v. *Inglehart*, 204 U.S. 478, 51 L. ed. 575; but if therein we err, then *arguendo*

(c) An appropriate construction of Section 7716-05 (b) is to be had whereby serious constitutional questions may be avoided. This Court said in *Rosenberg* v. *Fleuti*, U.S. , 10 L. ed. 2d 1000, 1002:

> "* * * Upon consideration of the case, however, and in accordance with the long-established principle that 'we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable,' Spector Motor Service, Inc., v. McLaughlin, 323 U.S. 101, 105, 89 L. ed. 101, 103, 65 S. Ct. 152; see also Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 91 L. ed. 128, 67 S. Ct. 231; Neese v. Southern R. Co., 350 U.S. 77, 100 L. ed. 60, 76 S. Ct. 131; Mackey v. Mendoza-Martinez, 362 U.S. 384, 4 L. ed. 2d 812, 80 S. Ct. 785, we have concluded that there is a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether §212(a)(4) is constitutional as applied to respondent."

See also *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 4 L. ed. 2d 1170, 1177; *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; and Section 7716-05(b), on its face, related exclusively to the future with Appellant's franchise dominant.

We stress that Appellant has never alleged that its franchise contract cancelled Appellee's certificate rights, but only that Appellant's rights were first in time and, therefore, in law; and that this Court, properly construing the grant of power made by the state, must do that which was done by this Court in *Woodruff* v. *State of Mississippi*, 162 U.S. 291, 40 L. ed. 973, where, when Mississippi's Court held the delegation of power to be void, this Court appropriately held valid and imposed the obligation accordingly.

Normally, Appellants' Jurisdictional Statement as to Question I should here terminate, but having briefed to the

point of demonstration, we submit, for utilization if the Court sees proper, an epitome of that relied on below as Appendix "8".

With deference, we submit that the contract above quoted is valid and has been made a shambles of by Mississippi's Court, contrary to the Contract Clause. Mississippi's Court assumed to assign certain reasons for its holding whereasto this Court has exclusive jurisdiction and whereover herein it must exercise that jurisdiction to prevent the wrack and ruin that otherwise would be wrought:

(1) The police power. Under the State's police power the right to impair is wrongfully claimed. Compare *Stone* v. *State of Mississippi*, 101 U.S. 814, 821, 25 L. ed. 1079, wherein Mr. Chief Justice Waite made crystal clear that as to property rights impairment might not be, and these are property rights of Appellant. *Alabama Power Company* v. *Ickes*, 302 U.S. 464, 82 L. ed. 374. As to our franchise, note *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, and the *Vicksburg Cases*, cited *supra*. In *Fletcher* v. *Peck*, 6 Cranch 87, 3 L. ed. 162, Mr. Chief Justice Marshall said, p. 178:

> "* * * A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant."

Compare *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204; *Detroit United Ry.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

In *Fauntleroy* v. *Lum*, 210 U.S. 230, 52 L. ed. 1039, from this State, both the Legislature and the Court asserted the supremacy of the police power against a judgment lawfully rendered in Missouri upon a Mississippi transaction, but this Court held the Full Faith and Credit Clause paramount thereto.

(2) Alleged plenary power of the State over its municipalities. Unquestionably, *inter se*, between the State, *qua* State, and the municipality, there is a power whereover the Contract Clause is not operative, for the reason of the unity of the State and its agency. "L'etat, c'est moi". *New Orleans* v. *New Orleans Waterworks*, 142 U.S. 79, 35 L. ed. 943; *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 13 L. ed. 518; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110. But when the State authorizes a municipality to contract with a third party and that contract with that third party has been made, then the State has plenary power *with the consent of the contractee* to modify or cancel, disregarding the city. Compare *Worcester* v. *Worcester Consolidated Street R. Co.*, 196 U.S. 539, 49 L. ed. 591; *Trenton* v. *New Jersey*, 262 U.S. 182, 67 L. ed. 937. Of course, the required consent was lacking in these cases.

The interlock between the State and its municipalities, the State possessing plenary power thereasto, is *sui generis;* and when the State could authorize the municipality to act and the municipality has, assuming that power to exist, contracted as was here done, our submission is that the State is estopped from alleging that its representative did not have power to do that done when this course had persisted for three-quarters of a century. The State's action after such a lapse of time brings in the well known maxim, "Nemo allegans suam turpitudinem est audiendus", 66 *C.J.S.* 4; or if that be not granted, then "Verba chartarum fortius accipiuntur contra proferentem", *Broom's Legal Maxims*, p. 594. The Legislature with the whole dictionary at its command chose that verbiage whose connotation has been fixed and, after all these years, this verbiage may not be so wrested from its judicially defined definition as to wreck those who in good faith relied thereon. When Appellant accepted the franchise, the Con-

tract Clause supervened and no impairment could happen. *Gomillion* v. *Lightfoot*, 362 U.S. 339, 5 L. ed. 2d 110; *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389.

(3) The Court relied on Section 2780, *Recompiled Mississippi Code of 1942* (Appendix No. 5-A), as a predicate for excluding Appellant from Area "B". Thereasto the Court declared, *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 149 So.2d 504, 513:

> "* * * Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation."

This grant was to all persons and was non-exclusive until March 29, 1956. Prior to that date, it had been utilized by the electric companies, possibly in contravention of Section 95, *Mississippi Constitution*, prohibiting donations. Compare *Willmut Gas & Oil Company* v. *Covington County*, 221 Miss. 613, 71 So.2d 184, appeal dismissed, 348 U.S. 891, 99 L. ed. 700; but in virtue of the certificate issued under Section 7716-05(b), the Mississippi Court assumed to vouchsafe to Appellee an exclusive perpetual franchise under a certificate of convenience and necessity, therethrough excluding Appellant from Area "B", notwithstanding its non-exclusive rights therein. The certificate received from the Commission by Appellee necessarily by law contained the limitation, "This certificate of convenience and necessity is dependent upon the securing by grantee of a valid non-exclusive municipal franchise to serve in Area 'B'." See *Payne* v. *Jackson City Lines*, 220 Miss. 180, 70 So.2d 520; *Oliphant* v. *The Carthage Bank*, 224 Miss. 386, 80 So.2d 63.

The rights of both Appellant and Appellee could coexist; and Section 2780 did not pretend to make any right

thus exercised exclusive. In *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 83 L. ed. 543, this Court thoroughly explored the rights of the holders of certificates of public convenience and necessity and held that such holders had no standing to question subsequent competition by the T.V.A. See especially 306 U.S. 140-143, 83 L. ed. 551-552.

The Act itself authorizes at any time an application to the Commission for a certificate. If under certain conditions, within six months, an application has been filed, then it issues without proof, but this free grant does not divest the Commission of plenary jurisdiction if essential to grant at any time a certificate of convenience and necessity; and just as the Interstate Commerce Commission can issue conditional certificates to protect existent or essential rights, the Commission here may do likewise. Furthermore, for any failure hereasto, Appellee may not challenge. *Alabama Power Company* v. *Ickes*, 302 U.S. 464, 82 L. ed. 374, approving *New Orleans, M. & T.R. Co.* v. *Ellerman*, 105 U.S. 166, 26 L. ed. 1015; see also *West Bros.* v. *Illinois C.R. Co.*, 222 Miss. 235, 75 So.2d 723. Neither the State nor Winona have attacked the now or "hereafter" clause and until they do, Appellee, who is not in privity, may not affect a contract to which it is not a party. Compare *Wade* v. *Colonization Society*, 7 Sm. & M. 663; *Jones* v. *Habersham*, 107 U.S. 174, 27 L. ed. 401; *Middleton* v. *Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

(4) As to the Contract Clause, Mississippi Court's jurisdiction is subordinate and cannot in any wise contravene that specifically provided by the parties and prescribed by law; and when that Court undertook to say that no impairment had occurred, as to the obligation of the contract, by declaring that thereasto the State had

plenary authority, that Court plainly usurped the jurisdiction of this Court and wrecked Appellants. All of these cases, as above shown, had been decided previously by the Supreme Court of Mississippi and by this Court in cases coming from this State; and the law thereasto is that this contract is valid and has been fundamentally impaired. In fact, the impact of the Act upon the structure precedently existing has been to render requisite this review. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; *Planters' Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447; *Detroit United R. Co.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268; and *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204.

Upon full argument, the validity of this contract with its flagrant impairment can be demonstrated under multiple decisions not herein called to this Court's attention in this Jurisdictional Statement. Our contracts having been ignored, it was precisely the same situation this Court rectified in *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. ed. 215, where, though summoned, the party was not permitted to defend.

B.

Violation of Fourteenth Amendment, Both Due Process and Equal Protection

That apposite hereinabove set out, with deference, is referred to.

The Commission broadly stated that, without consideration of the franchises, Appellees' certificates primed. The Commission did not deign to discuss, if it constitutionally could, the relative merits, but awarded, without weighing, Appellees certificates excluding Appellant from Area "B", while compelling Appellant to perform in Area

"A". So to sever and divide contracts is constitutionally unthinkable. The authorities hereasto appear later.

Grievous wrong has been wrought, contrary to the Constitution by a statute subsequently passed. If appropriately construed under the Constitution, all rights can be secured and preserved; but if the construction made by Mississippi's Court thereasto, which, with deference, we submit was wrongful, is here approved, that constitutional protection whereto contracts are entitled will have disappeared from off the earth by the failure, with deference, of this Court to effectuate that to it solely entrusted.

II.

Admitting *arguendo* that Section 7716-05(b), *Recompiled Mississippi Code of 1942*, was appropriately construed by the Supreme Court of Mississippi, thereby excising from Appellant's contracts the municipal consumption within Area "B", thereby said Section impaired the obligation of the contract. The contracts explicitly provided:

> "1. Company will furnish and Municipality will take and pay for its entire street lighting service during the term of this Agreement in accordance with Rate Schedule SL-4 & SL-5 attached hereto and made a part hereof.
>
> * * *
>
> "6. The term of this Agreement shall be for five years from and after the date hereof and shall be automatically extended for a period of five years from each expiration date of such time, or any automatic extension thereof, unless and until either party shall notify the other in writing not less than 180 days nor more than 360 days prior to any expiration date of its intention to terminate this Agreement."

Basically, this contract is statewide; and in *Mississippi Power & Light Company* v. *Coldwater*, D.C. Miss., 168 F.

Supp. 463, a precisely similar contract has been sustained as valid.

Herein the municipality contracted to purchase its requirements from Appellant, provided neither Appellant nor the municipality gave cancellation notice at a terminal period. Requirements contracts are standard. *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353, 73 L. ed. 1112; "Annotation", 5 L. ed. 2d 1105, 1110; 5 *Williston on Contracts* (Rev. Ed.), Sec. 1651A, p. 4646; 46 *Am. Jur.*, "Sales", Sec. 158, p. 334; 77 *C.J.S.*, "Sales", Sec. 171, p. 906.

This contract is valid under the cases cited herein.

Every statute of Mississippi as appropriately construed by this Court becomes a part of the obligation of this contract. *Keefe* v. *Clark*, 322 U.S. 392, 88 L. ed. 1347; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 18 L. ed. 403; *Wisconsin Lbr. Co.* v. *State*, 97 Miss. 571, 54 So. 247.

This is not a case wherein there has been the ordinary breach of contract by a corporation, but the State Legislature, speaking with the State's sovereign power, has assumed to take from that contract that which was Appellant's and transferred it to Appellees, according to the decision here sought to be reviewed, and condemned Appelant to destroy its facilities constructed in strict accordance with the contract and to desist from electric service, this contract to the contrary notwithstanding.

That there was impairment is demonstrated by *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 82, 46 L. ed. 808. There was a thirty year contract for hydrant rental, and this Court, *inter alia*, said, p. 82:

> "* * * we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability upon any contract

> for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question."

At the instance of Appellee, the State not being a party, Mississippi's Court, wrongfully assuming to act unmindful of the Contract Clause, has attempted to strike down the contract in part and to leave it in effect at its pleasure. As to impairment, this Court said in *Planters' Bank* v. *Sharp*, 6 How. 301, 327, 12 L. ed. 447:

> "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its force. The Commercial Bank of Rodney v. The State of Mississippi, 4 Smedes & Marshall, 507. So, if the obligation of a contract is to be regarded as the duty imposed by it, here the duty imposed by the State to adhere to its own deliberate grant, and the duty imposed on the signer of the note to make payment to an assignee, as well as to the bank itself, are both interfered with and altered."

Note further that the State, *quo* State, has not come into this litigation, but an REA is the sole protagonist which has struck down this contract, over the protests of all parties concerned in the Clinton case, when, with deference, circumstanced as the State is, it was an indispensable party hereto. Compare *Hansberry* v. *Lee*, 311 U.S. 32, 85 L. ed. 22; *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 78 L. ed. 894.

Appellant's contracts are dominant. Anything Appellee may have is subsequent thereto and therefore must be servient. This Court alone has that jurisdiction which may rectify the wrong wrought.

With reference to the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the United States in *Owens* v. *Battenfield*, 33 F.2d 53, 280 U.S. 605, 74 L. ed. 649, 50 S. Ct. 88, has held that the Amendment is not limited as to the form in which, or the agency by which, the State may act in denying "due process". The Court further held that any such action by the State, either by an executive, legislative or judicial agency, comes within the meaning of the Amendment. See also *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 41 L. ed. 979, 17 S. Ct. 581; *Scott* v. *McNeal*, 154 U.S. 34, 14 S. Ct. 1108, 38 L. ed. 896. *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

III.

Basically the construction of the contract and the impairment rests as to the Constitution with this Court, but appropriate respect is vouchsafed the State Court's opinion. Compare *Woodruff* v. *State of Mississippi*, 162 U.S. 291, 40 L. ed. 973, 66 Miss. 298, wherein Mississippi's Legislature authorized the No. 1 Levee Board to "borrow money". Pursuant thereto, that Board obtained gold

tinted paper and recited the receipt of gold dollars which were then at a great premium. Mississippi's Court held that this contract to pay in gold was *ultra vires* and the bonds void. Upon appeal here, after being thrice argued as to whether or not this gold bond, so-called, was solvable in gold or in dollars, this Court found it so solvable and reversed Mississippi's Court. *Planters' Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447; *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268; *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204.

With this primary obligation of constitutional construction, it is fundamentally mandatory that if the case may be solved and a serious constitutional question avoided, it must so be. *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; *Lynch* v. *Overhalser*, 369 U.S. 705, 8 L. ed. 2d 211; and in *International Machinists* v. *Street*, 357 U.S. 740, 749, 6 L. ed. 2d 1141, 1150, this Court said:

> "* * * Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' Crowell v. Benson, 285 U.S. 22, 76 L. ed. 598, 619, 52 S. Ct. 285. * * *."

Hereinabove under Question I(c), Appellants have demanded as their constitutional right a correct construction of Section 7716-05(b) and likewise of Section 7716-38, and to avoid prolixity make reference to same.

Appellants submit it to be obligatory, in order to conform to the Constitution, that Appellant's contracts, quoted *supra*, be adjudged to be valid, especially the provision "now or hereafter". This Court cannot forget that in 1886,

under a grant of power the precise equivalent of that made by the State to the municipalities, the City of Vicksburg passed a thirty year franchise containing not only the "now or hereafter" clause, but a further provision as to jurisdiction conferred and, under Section 13 of the ordinance, allowing the fixation of reasonable rates; and that this Court validly assumed that the thirteenth clause as to the fixation of rates in the area "now or hereafter" was effective. *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U.S. 453, 50 L. ed. 1102; and *Vicksburg* v. *Vicksburg Waterworks Co.,* 206 U.S. 496, 51 L. ed. 1155.

When the Legislature used the precise verbiage and pursuant thereto allowed the grant to be made and a contract had, this Court must hold Appellant entitled to contract rights in Area "B" that are dominant. The State, with deference, under the decisions herein, is guilty of repudiation when it freed itself from performance of that which, through its authorized agency, it had specifically authorized.

We repeat, the franchises and statutes expressly gave non-exclusive franchises in Area "B". With the law thus fixed, Mississippi's Court cannot by misinterpretation donate to Appellee that belonging to Appellant.

IV.

The Mississippi Public Service Commission declared:

> "* * * We do not consider the municipal franchise granted Mississippi Power & Light Company by the City of Winona to be germane to any of the issues in this cause. Therefore we have disregarded the franchise completely as we believe it has no bearing on the case. The Commission, however, does not decide or pass upon the validity of the franchise or attempt to interpret or construe its provisions. The

> Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Dockets No. U-44 and U-117. The first certificate does not include the disputed area. The second certificate does include the area in question."

Basically, it was questionable to what extent, if at all, the Commission could adjudicate constitutional questions, *Yazoo & M.V.R. Co.* v. *Adams*, 81 Miss. 90, 32 So. 937; and herein the Supreme Court said that these constitutional questions were without merit. Hence the Commission, assuming to adjudge, excluded the constitutional rights, and Appellant has had no hearing, as was said in *Hannah* v. *Larche*, 363 U.S. 420, 442, 4 L. ed. 2d 1307, 1321:

> " 'Due Process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. * * *."

Cafeteria Workers v. *McElroy*, 367 U.S. 886, 6 L. ed. 2d 1230.

Note that when Appellant's property was ordered destroyed, though essential to perform its obligation owed to the State, neither the State nor the City were in any wise bound by the decree, nor was Appellant heard as to the relative merits between Appellant and the other parties to the contract, Appellee being a remote grantee and not in privity. In any adjudication wherein the parties in interest were not before the Commission and the Commission proceeded to adjudge their respective rights, due process has been fundamentally violated. Compare *Hansberry* v. *Lee*, 311 U.S. 32, 85 L. ed. 22; *Chase National Bank*

v. *Norwalk*, 291 U.S. 431, 78 L. ed. 894; *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. ed. 215.

V.

The statute here for construction provides, 7 *U.S.C.A.*:

(1) Section 902:

> "The Administrator is authorized and empowered to make loans in the several States and Territories of the United States for rural electrification and the furnishing of electric energy to persons *in rural areas who are not receiving central station service* * * *."

(2) Section 913:

> "As used in this chapter the term 'rural area' shall be deemed to mean any area of the United States not included within the *boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants*, and such term shall be deemed to include both the farm and nonfarm population thereof; * * *."

As said in *Arizona* v. *California*, ... U.S. ....., 10 L. ed. 2d 542, Congressional intent does not appear from those who opposed the legislation, but those affected by this legislation are entitled, with deference, to assume as 100% accurate those things said by the bill expressly and by those who fathered its enactment, especially Senator Norris. These are ample aid for judicial construction:

Under authority granted by the Emergency Relief Appropriation Act, a temporary Rural Electrification Administration had been created by Executive Order, prior to 1936, as a means of relieving unemployment and the Act had its origin in Senate Bill No. 3483 (75th Cong., 2nd Sess.), which was designed to establish the Rural Electrification Administration on a permanent basis and for a different purpose.

The Bill was reported out by the Senate Committee on Agriculture and Forestry without hearings. However, Senator Norris, who was in charge of the Bill on the floor of the Senate, stated, in response to inquiries from other Senators, that the Bill was not intended to authorize loans *"for the purpose of electrifying a rural area which is now supplied"*; that "where a plant is now in existence which is adequately supplying a certain area with electricity none of the money provided by the Bill could be used for that purpose"; and "There is no intention of going into a farming community which is already supplied with electric current."

The report of the Senate Committee on Agriculture and Forestry states that the Committee had referred the Bill to the Secretary of Agriculture, to the temporary REA, to the Federal Power Commission, and to the Department of the Interior, and that each of these agencies had approved the Bill. (Sen. Rep. No. 1581, 74th Cong., 2nd Sess.). A number of amendments recommended by the Senate Committee had been inserted at the suggestion or request of the temporary REA (80 Cong. Rec. 2752, 2755, 2758).

The House Committee on Interstate and Foreign Commerce (Congressman Rayburn, Chairman) held extensive hearings upon the Bill as passed by the Senate. At the request of Chairman Rayburn, Mr. Cooke appeared before the House Committee, explained the Bill, and stated that he was appearing in its support. Report of Hearings, pp. 2, 4. In response to questions from members on the House Committee, Mr. Cooke testified that it was contemplated by the Bill that distribution lines would *"receive current from established utilities"*; that the bill was intended to carry on the practices of the temporary REA; that the practice of the temporary REA was to use *"the current of*

private companies or other existing plants" and to build no "*competing transmission lines*"; that it was not the purpose of the Bill "to furnish electricity or to lend money for anyone to get electricity *where it is available*"; and that the "central station service" provision was intended to authorize loans to construct facilities to serve residents of rural areas who were receiving service from "*individual Delco plants*" but did not have "*the normal service from a power line*".

In the course of the House debate, Congressman Rayburn, who was in charge of the Bill, stated:

> "May I say to the gentlemen that we are not, in this bill, intending *to go out and compete with anybody*. By this bill we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them." (80 Cong. Rec. 5283, 1936).

In the course of the House Debate, Congressman Fletcher, speaking in support of the Bill, said:

> "*There is no desire to provide loans either where service exists or where, legitimately and in truth, the power companies are about to provide service.*" (80 Cong Rec. 5308).

In an Opinion dated November 24, 1942, the Solicitor of the Department of Agriculture, in construing REA's authority to make loans "for the furnishing of electrical service to persons in rural areas who are not receiving central station service", said:

> "A study of the debates in Congress and the Committee hearings indicates that this provision was inserted because of a legislative intent to exclude loans for the purpose of paralleling existing systems and thus creating competition with established utilities."

(Opinion No. 4506, Hearings, Senate Subcommittee on Agriculture Appropriations for 1951, 81st Cong., 2nd Sess., p. 1378).

With respect to the meaning of "central station service" as used in Section 4 of the Act, W. Carroll Hunter, Solicitor of the Department of Agriculture, in Opinion No. 5247, dated November 3, 1948, said:

> "Congressional debates and committee hearings contain frequent references to the clause in question; but, as has been noted, these discussions were generally concerned with the question of competition. The term 'central station service', in itself, was generally envisioned as relating to the difference between the small Delco plant serving the individual farm (which was, clearly, not receiving 'central station service'), and the utility company's high line, carrying 2,200, 6,600 or some other common distribution voltage, which passes down the road to serve others. *This distinction serves to emphasize the point that the interest of Congress, in this provision, was to prevent competition with established utilities.* * * *."

It is judicially known that these loans to the Appellees are on a basis of 2% interest and that the current cost of money to the United States is nearly 4%. Too, that these Appellees are assumed to be tax exempt insofar as the Federal income tax is concerned and the cost to the Federal Government of this immunity is stated to be $150,000,000 by Robert T. Patterson, former professor of economics at Claremont Men's College in his book, "The Tax Exemption of Cooperatives". Besides the Appellant is compelled to pay not only Federal but State income taxes aggregating approximately 60% for the general welfare. In addition, at this date more than 98% of the farms have been electrified and are receiving all electricity they fain would have. Officials of the REA recognized that Congress expected rural electric cooperatives to be almost exclusively

distributors of electricity. In 1936, the first Administrator of the REA program told a committee of the House of Representatives that "in 99 instances out of 100 they are going to buy current from existing plants". Out of the new customers, five out of six, the Court may judicially know, are in rural territory, but are adjacent to the fast developing urban population and should be classified as such and should not, as against those who dwell within the municipality, be vouchsafed a fundamental exemption. In addition, it may be judicially noted that the REA is actively promoting generation and transmission lines at government expense, and it is claimed that the average cost from the investor-owned power companies is less considerably than that being obtained from such REA operations. Furthermore, that thereasto a profund secrecy, certainly impenetrable to Appellant, is sought to be maintained as to these matters. That here at issue is whether or not Appellant may be vouchsafed protection against those thus created and thus intended to serve.

The deference due Congressional discussion is exemplified in *United States* v. *Philadelphia National Bank*, ... U.S. ....., 10 L. ed. 2d 915, 935; and *Commissioner of Internal Revenue* v. *Church*, 335 U.S. 632, 687, 93 L. ed. 288, 321. Opinion Mr. Justice Frankfurter. Herein, the terms of the statute are express. With deference, construction is not called for. *Rosenberg* v. *Fleuti*, ... U.S. ....., 10 L. ed. 2d 1000, 1003, 1009. Those who induced Congress thus to legislate made the representations upon which, with confidence, Appellant relies. Herein Appellant is not the actor but is a property owner claiming constitutional rights. The Appellee, as actor, has had that property destroyed, those rights forfeited, when Appellee was burdened with those restraints and restrictions thus expressly and explicitly declared by Congress. That at issue is whether Appellant, thus attacked, not attacking, may in-

voke in defense the provisions expressly put in the statute and expressly explained by those who spoke with authority. *Hovey v. Elliott*, 167 U.S 409, 42 L. ed. 215. Herein, there is not, with deference, a primary question of the standing to sue. *Abington School District* v. *Schempp*, ... U.S. ....., 10 L. ed. 2d 844; *Chicago* v. *Atchison, Topeka & Santa F. R. Co.*, 357 U.S. 77, 2 L. ed. 2d 1174, cited in *Hanson* v. *Denckla*, 357 U.S. 235, 2 L. ed. 2a 1283. Both the Commission and the State Court have denied Appellant the right to interpose the provisions of this REA Act as a defense; but have expressly rewritten the Federal statute so as to authorize Appellee to preempt an area as a public utility, to oust Appellant from service therein as to persons with whom it has a constitutional right to contract, and compelled a discontinuance of valid contracts to Clinton and Winona, each being municipalities containing more than 4,000 people. This question is two-fold: (a) Has Appellant those statutory rights openly declared and publicly proclaimed? And if not, (b) May Mississippi, by its Act and its construction thereof, so subvert the Supremacy Clause as that Mississippi's statute and not the Federal statute is the law of the land? Compare *Capital Electric Power Association* v. *McGuffee*, 226 Miss. 227, 83 So.2d 837; *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So.2d 739; *Mississippi Power Company* v. *East Mississippi Electric Power Association*, 244 Miss. 40, 140 So.2d 286; *Capital Electric Power Association* v. *Hinson*, 230 Miss. 311, 92 So.2d 867; *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ..... , 149 So.2d 504; *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ..... , 150 So.2d 534.

The interplay between Federal and State power in a question of this character can only be solved here. Ap-

pellant having relied upon the fair expressions in the statute and the honeyed expressions of those who produced the REA Act, we do protest that this Court will not permit the promise to be kept to the ear but broken to the heart. Our viewpoint is that there would be repudiation. *Perry* v. *United States*, 294 U.S. 330, 79 L. ed. 912. Burdened with the obligations inherently imposed by this statute, Appellee does not come with clean hands. Behold, contrary to the Contract Clause and the Due Process Clause, that which was Appellant's is now Appellee's under the statute.

We submit that naught contra is to be found in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 82 L. ed. 374; *Duke Power Co.* v. *Greenwood County*, 302 U.S. 485, 82 L. ed. 1240; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 83 L. ed. 543. In these cases the public utility attacked to free itself from alleged unlawful competition. Here, (a) Appellant is attacked by the Appellee who exists solely through the beneficence of the REA Act, and may not blow hot and cold; (b) more especially, Appellees, having received in trust for a specific purpose, are violating that trust to the ruin of one entitled to constitutional protection; (c) the trust having been for rural electrification, 98% has been electrified. "Ratione Cessante, cessat ipsa lex", 52 C.J. 1149; *Jefferson Standard Life Ins. Co.* v. *Noble*, 185 Miss. 360, 188 So. 289; and (d) the Nation forbade, or, at least, we claim it did, while the State commands that forbidden to be done. The line must be marked out here. *South Carolina* v. *United States*, 199 U.S. 437, 50 L. ed. 261; *New York* v. *United States*, 326 U.S. 572, 90 L. ed. 326.

Of the many cases arising in this field, this is the first one reaching this bizarre result. *Farmers Electric*

Co-op. Corp. v. *Arkansas Power & Light Co.*, 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act No. 85, and Ark. Laws 1957, Act No. 103; *City of Wichita Falls, Tex.*, v. *Bowen*, 143 Tex. 45, 182 S.W.2d 695, 154 A.L.R. 1434 (1944); *Omaha Transit Co.* v. *Briggs*, 167 Neb. 703, 94 N.W.2d 461, 28 PUR 3d 26 (1959); *Whitaker* v. *Louisville Transit Co.*, 274 S.W.2d 391 (Ky. 1954); *Rosehill Cemetery Co.* v. *City of Chicago*, 352 Ill. 11, 185 N.E. 170, 87 A.L.R. 742 (1933); *Deneen* v. *Houghton County St. Ry. Co.*, 150 Mich. 235, 133 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); *Public Service Co.* v. *Public Utility Comm. of Colorado*, 142 Colo. 135, 350 P.2d 543 (1960); *Clarke-Washington Electric Membership Corp.* v. *Alabama Power Co.*, 272 Ala. 598, 133 So.2d 488 (1961); *Duke Power Co.* v. *Blue Ridge Electric Membership Corporation*, 253 N.C. 596, 117 S.E.2d 812, 37 PUR 3d 396; *Pee Dee Electric Membership Corporation* v. *Carolina Power & Light Company*, 253 N.C. 610, 117 S.E.2d 764, 37 PUR 3d 387; 256 N.C. 56, 122 S.E. 761; see also *Texas ex rel. Southwestern Gas & E. Co.* v. *Upshur Rural Electrical Coop. Corp.*, (1957) 156 Tex. 633, 638, 18 PUR 3d 53, 57, 298 S.W.2d 805, 808; *Town of Coushatta et al.* v. *Valley Electric Membership Corporation*, (La. Appeals, 1962) 139 So.2d 822. See also *Russell* v. *Sebastian*, (1914) 233 U.S. 195, 209, 34 S. Ct. 517, 58 L. ed. 912, 923; followed in *Southern Bell Telephone & Telegraph Co.* v. *City of Meridian*, (1961) 241 Miss. 678, 131 So.2d 666, 673.

WHEREFORE, with deference, jurisdiction exists here by appeal; the questions are substantial; and rectification should be wrought by the only Court charged with this duty; but if certiorari should be applicable, then it is hereby prayed for and the Court asked to grant the writ

and deal appropriately with the Federal questions in this Jurisdictional Statement set forth.

WISE, SMITH & CARTER,
Electric Building,
Jackson, Mississippi,

FRED B. SMITH,
Ripley, Mississippi,

GREEN, GREEN & CHENEY,
Electric Building,
Jackson, Mississippi,
Of Counsel.

_____,
SHERWOOD W. WISE,

_____,
FRED B. SMITH,

_____,
GARNER W. GREEN,

_____,
JOSHUA GREEN,
Attorneys for Mississippi Power & Light Company.

CHARLES C. JACOBS, JR.,
Commerce Building,
Cleveland, Mississippi.

_____,
CHARLES C. JACOBS, JR.,
Attorney for Mississippi Municipal Association.

E. W. STENNETT,
Barnett Building,
Jackson, Mississippi.

_____,
E. W. STENNETT,
Attorney for City of Clinton, Mississippi.

PROOF OF SERVICE

I, Garner W. Green, of the firm of Green, Green and Cheney, attorneys of record for Mississippi Power & Light Company, depose and say that on the ..... day of ....., 1963, I served a copy of the foregoing Jurisdictional Statement on T. Harvey Hedgepeth, Esquire, attorney of record for Capital Electric Power Association, by mailing same, postage prepaid, to his address at Deposit Guaranty Bank Building, Jackson, Mississippi; and on Hardy Lott, Esquire, 226 Aven Building, Greenwood, Mississippi, attorney of record for Delta Electric Power Association, by mailing same, postage prepaid; and in the same manner served a copy upon the following who were Amici Curiae in the Supreme Court of Mississippi: R. B. Deen, Jr., Esq., Dixie Towers, Meridian, Mississippi, attorney for East Mississippi Electric Power Association; Everette Truly, Esq., City Bank Building, Natchez, Mississippi, attorney for Southwest Mississippi Electric Power Association; A. A. Cohn, Esq., Panzica Building, Brookhaven, Mississippi, attorney for Magnolia Electric Power Association; O. F. & J. O. Moss, Esq., Lucedale, Mississippi, Attorneys for Singing River Electric Power Association; D. H. Waits, Esq., North Broad Street, Leland, Mississippi, attorney for Twin County Electric Power Association; John K. Keyes, Esq., Collins, Mississippi, attorney for Southern Pine Electric Power Association; David C. Welch, Esq., Gardiner Center Offices, Laurel, Mississippi, attorney for Dixie Electric Power Association; J. P. Stone, Esq., Coffeeville, Mississippi, attorney for Tallahatchie Valley Electric Power Association; Semmes Luckett, Esq., 121 Yazoo Avenue, Clarksdale, Mississippi, attorney for Coahoma Electric Power Association; Coast Electric Power

Association, Bay St. Louis, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi.

Sworn to and subscribed before me, this the ..... day of ....., 1963.

Notary Public

My Commission Expires:

APPENDIX

APPENDIX "1-A"

No. 42,535

IN THE SUPREME COURT OF MISSISSIPPI
DELTA ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL

'ETHRIDGE, JUSTICE:

This case involves an order of the Mississippi Public Service Commission (called Commission), directing Mississippi Power & Light Company (called Company) to cease and desist from rendering electric distribution service or street lighting service in a newly annexed area of the City of Winona, which was certificated by the Commission to Delta Electric Power Association (called Delta). The Mississippi Municipal Association was allowed to intervene. It supported the position of the Company.

The Company and Municipal Association appealed from the Commission's order to the Chancery Court, First Judicial District of Hinds County, which reversed it. That court held that Delta had no right to operate in the disputed area, and ordered Delta to cease and desist from doing so. It adjudicated that the Company's municipal franchise, upon expansion of the city limits, extended into the newly incorporated area, and thereby superseded Delta's certificate from the Commission, issued when the disputed area was outside the city limits.

The facts are without any substantial dispute. The issues are principally those of construction of Section 5 of the Public Utility Act of 1956, in the light of the facts and

MICRO CARD
TRADE MARK ®
22
MATTHEW BENDER & COMPANY
MB
PC 44
6-64
microcard

several prior decisions. Miss Laws 1956, Ch. 372; Miss. Code 1942, Rec. Secs. 7716-01 to 7716-38. We conclude the Commission's order was correct, reverse the decree of the Chancery Court, and reinstate and affirm the Commission's issuance of a cease and desist order.

The precise issue is whether, under the Act, the expansion of the city limits extended Company's service area into the annexed area, under its municipal franchise granted prior to the 1956 Act and before the expansion, and superseded the prior grandfather certificate to the annexed tract, granted by the Commission to Delta, which served the area before it came within the city limits. We think it did not, and that Delta's certificate was properly protected by the Commission's order.

Both Delta and Company are public utilities engaged in the transmission and distribution of electricity, and subject to the Public Utility Act of 1956. Miss. Laws 1956, Ch. 372, Sec. ID. Delta is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474(8). It has the power of eminent domain. Sec. 5474(6) (14). Delta has the obligation and duty to render non-discriminatory service to all persons subscribing for it, who live in the areas served by that corporation. Capital Elec. Power Assn. v. McGuffee, 226 Miss 227, 83 So.2d 837 (1955). It operates in thirteen counties in the state.

Mississippi Power & Light Company, a subsidiary of Middle South Utilities, is incorporated under the laws or Florida, and qualified to do business in Mississippi. All of its property is located in this state, generally in the western one-half from the Tennessee to the Louisiana line.

Delta was incorporated in 1938. In 1940 it constructed an electric line in the vicinity of, but outside the west corporate limits, of the City of Winona. There were no other electric lines in this area, and electric services was not then available to anyone in this rural area. Delta served the only two customers in it who desired electricity at that time. After it was made available, and as a result of this and other factors, this area west of the city limits slowly developed, over a period of years, and Delta obtained other customers. It served all of these additional customers.

On February 23, 1948, the City of Winona granted a franchise to Mississippi Power & Light Company for electric service in that municipality, its streets and public places, "as they now exist or may hereafter be laid out or extended." This franchise was for a period of twenty-five years, so it expires in 1973. Since 1948 Company has been furnishing electric service in Winona under that franchise. During this same period and since 1940, Delta has been furnishing electric service to those desiring it in the disputed area which was west of the city limits prior to December 31, 1959.

In 1948 the City made a street lighting agreement with the Company, for five years, and renewable for similar additional periods unless either party elected to terminate it. That contract is still in effect.

The Public Utility Act became effective on March 29, 1956. Miss. Laws 1956, Ch. 372, Sec. 40. Before that date there was no statewide regulation by the Public Service Commission or any other state agency of the service areas, rates, or related operations of electric public utilities. Subject to certain limitations, the act vested "exclusive original jurisdiction" over these matters in the Commission. *Ibid.*, Sec. 4.

Section 5(b) provides for grandfather or prior service certificates of convenience and necessity. It states that the Commission shall issue such a certificate to any person engaged in the operation of electric facilities and equipment "for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation," if the application was made within six months after the effective date of the act. Both Delta and the Company filed applications within the six months, and thereafter negotiated over a lengthy period for the purpose of agreeing on areas which they should recommend to the Commission for certification to Delta and Company, respectively. They agreed that the disputed area involved in this suit should be certificated to Delta and that certain other areas should be certificated to Company. Hence they submitted to the Commission a letter of agreement, and map showing the recommended areas of agreement for prior service certificates.

On November 25, 1959, all of the disputed area involved in this suit was certificated to Delta. The Company was a party to that proceeding, did not appeal from it, and the Commission's order, granting the grandfather certificate to Delta, became final. Delta has continued since that date to serve every electric customer in the area, including two street lights for the City of Winona. Delta's grandfather certificate from the Commission describes the disputed area involved in this suit by metes and bounds, and clearly covers it.

By an ordinance effective December 31, 1959, the City of Winona extended its corporate limits to the north, south, and to the west. The disputed area here involved is part of the western expansion of the city limits, annexed on that date to the municipal boundaries of Winona.

In May, 1960 the Company, without any authorization from the Commission, constructed an electric line into the disputed area, previously certificated by the Commission to Delta, extended it to the Hightower property, and in June, 1960 constructed two prongs from this line in the disputed area for the purpose of serving street lights. No electric service was actually rendered to the Hightower property. The street lights were operated for several weeks, when the bulbs were removed.

On May 31, 1960 Delta filed the present petition before the Commission, asking it to order the Company to remove its line from Delta's area and to cease and desist offering its electric service to service locations within areas certificated to Delta. The Company filed its answer and cross-petitioned. It took the position that extension of the city limits expanded its precedent franchise from the city to cover the newly annexed area.

After a lengthy hearing, the Commission's supplemental and amended order of July 18, 1961 ordered the Company to cease and desist from offering electric service and operating facilities within the disputed area. It denied the cross-petition. The Commission found that Delta's certificate of November 25, 1959 contained a particular legal description of the area certificated to Delta, which included the disputed area; that the Company did not appeal from the order granting Delta that certificate; that since March 29, 1956 Delta has been rendering reasonably adequate electric service within the disputed area; and the Company's certificate did not include any part of that area certificated to Delta. The Commission stated it did not consider the municipal franchise granted to the Company by Winona to be germane to the issues, and did not pass upon the validity of that franchise. It ruled

solely on the respective rights of the parties arising out of their certificates of convenience and necessity.

I.

Prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of grandfather certificates under Section 5 are made on an area rather than a facility basis; (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts.

An electric power association is under an obligation to render electric service upon a nondiscriminatory basis to its members and to other persons living in the area. Capital Electric Power Assn. v. McGuffee, 226 Miss. 227, 243, 83 So.2d 837, 84 So. 2d 793 (1956). A non exclusive franchise is a valuable right which can be protected in the courts. Miss. Power Light Co. v. Miss. Power District, 230 Miss. 594, 611, 93 So. 2d 446 (1957); Payne v. Jackson City Lines, Inc., 220 Miss. 180, 70 So. 2d 520 (1954).

In Miss. Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 106 So. 2d 375 (1958), it was held that a revenue bond issue, to provide funds for acquisition of electric distribution facilities in a municipality, was void because of defective notice. Whether an electric power association should be permitted to "invade an area" already having electric utility service furnished by the company was first for determination by the Commission. The opinion discussed briefly Section 5 of the Act, recognized the right under Section 5 (b) to a grandfather certificate, and observed that under the second paragraph of Section 5 (d) provision is made for more than one utility operating within a municipality. 234 Miss. at 634.

United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946 the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature "reserved the right to pass such laws as may be expedient or necessary in municipal affairs." The 1956 Act superseded pro tanto the precedent franchise to United. The legislature, acting under its police power, had the right to vest in the Commission power to determine rates.

Capital Electric Power Assn. v. Miss. Power & Light Co., 240 Miss. 139, 125 So. 2d 739 (1961) (called the Elton case), spelled out in some detail the rights of a holder of a certificate of public convenience and necessity from the Commission. The Elton Company operated a wood-shipping plant three miles south of the City of Jackson. Capital Electric had been serving the area for 17 years, and obtained from the Commission a grandfather certificate under the 1956 Act, which covered the area involved. Nevertheless, Miss. Power & Light Company applied for a certificate to construct lines to Elton, pursuant to its contract with it. The Commission's issuance of a certificate to Mississippi Power was affirmed by the circuit court, but on appeal that judgment was reversed.

Section 5 of the Act was discussed in some detail. Capital Electric was "obligated to render non-discrimina-

tory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor." Hence it was said that, having served the electric requirements in this area for 17 years, Capital Electric under Section 5(b) acquired the right to a certificate, "being in truth and in fact a franchise from the State. Such right is indeed a valuable one", although nonexclusive. By the Act "it was the intention of the legislature that facilities of one utility should not be duplicated in the same area"; that there should not be "duplication and overriding facilities and certificates." Hence it was said "An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear."

For emphasis, it was stated: "There should no longer be any doubt as to the rule in this State on that proposition." The Commission could not disregard the requirements of a grandfather certificate under Section 5(b). In summary, the opinion held: "To allow the invasion of Capital Electric's area on account of the desire of Elton Company, regardless of their reasons therefor, to be served by Mississippi Power & Light Company would lay down a principle which would result in endless duplication and make a shamble of the utility act. Such a policy cannot be countenanced by this Court."

Miss. Power Co. v. East Miss. Elec. Power Assn., 140 So. 2d 286 (Miss. 1962), involved principally an area within one mile around and adjacent to the City of Louisville. Louisville's Electric System contended that, under Sec. 1H of the Act, it had the sole right and privilege of operating within the one mile corridor. That provision stated that any public utility owned by a municipality should not be sub-

ject to the provisions of the Act, except as to extensions of utilities greater than one mile outside of corporate boundaries after the effective date. This provision was not a grant, but an exemption from regulation, limited in terms.

East Mississippi had been serving the outside area prior to and on the Act's effective date. It was held the legislature did not intend by this exemption "to take from a company that was operating within said corridor on the date of the Act its right to operate therein," and the Commission was justified in certificating the area to East Mississippi. Whether its certificate could be invaded depended upon whether the Commission found it rendered inadequate service, and failed to remedy it. The award of a certificate, it was held, is made on an area rather than a facility basis. *Capital Electric* so held. Moreover, East Mississippi was a public utility in statutory contemplation. Cf., Miss. Public Service Commission v. Holloway Transfer & Storage Co., No. 42,476, decided January 14, 1963 (Motor Vehicle Act).

In short, prior decisions under the Public Utility Act of 1956 hold that certificates to public utilities are based on an area basis, are valuable rights, although nonexclusive, entitled to protection of the courts, and the Commission (under Section 4) has "exclusive original jurisdiction over the intrastate business and property of public utilities." Cf., Miss. Code 1942, Rec., Secs. 5490-5497 (1938 preemption statutes for power assns.)

II.

Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think

the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not Consistent with the terms of the Act or with the legislative purposes.

The title of Ch. 372, Laws of 1956, states it is an act to "vest authority" in the Commission "to regulate certain public utilities." The preamble reveals legislative concern with utility services "both within and outside of municipalities," and the purpose to vest controlling power in the Commission "to regulate such utilities' rates and services." Section 4 gives it "exclusive original jurisdiction," with certain exceptions. There is no indication that a municipal expansion of boundaries would supersede a prior certificate from the Commission.

Subsection (d) of Section 5 is aimed at the precise issue involved here: "Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein.

Subsection (d) recognizes that two public utilities, such as Delta and Company, may hold certificates for similar operations in the same municipality. It authorizes operations to be carried on by them "within their respective certificated areas," and exempts them from further application for extension of their facilities within their "respective certificated areas of said municipality, including any extensions of the corporate limits thereof." In other words if such utilities extend or add to their facilities within their respective certificated areas of the city, which would include extensions of corporate limits of the city, they are exempt from further application to the Commission for such extensions or additions. This assumes the annexed areas are within the respective certificated areas of the two utilities.

The second paragraph of subsection (d) recognizes that both "co-operatives" and other utilities may operate within a municipality at the same time, and in such event they are subject to rate regulation. In short, subsection (d) specifically applies to and recognizes the existence of a situation such as that here presented, where Delta and the Company have respective certificated areas in the municipality, under the extension of the city limits. Section 5 (d) applies to certificate holders for areas subsequently annexed to municipalities. This is evidenced from the phrase, "including any extensions of the corporate limits thereof."

Subsections (b), (c), and (d), of Section 5, must be read together. Subsection (b), mandatory in nature, requires the Commission to issue a grandfather certificate where a person, as defined, is engaged in the operation of facilities on the effective date of the Act, March 29, 1956. Subsection (c) provides that "in all other cases" the Commission shall have a hearing on certificate applications, "provided, however, no certificate shall be required for

extensions or additions within the corporate limits of a municipality *being served by the holder of a certificate of convenience and necessity, . . .*" (emphasis supplied) Hence if there is only one holder of a certificate within a municipality, then it can construct extensions anywhere in the corporate limits without further application to the Commission. However, under subsection (d), where there are two holders of certificates in the same municipality, then each holder is only exempt from further application to the Commission for extensions *within its own certificated area* of the municipality.

The quoted part of subsection (c), upon which Company relies, must be considered along with subsection (d). When read together, the foregoing interpretation renders both subsections consistent with one another, the terms of the statute, and a reasonable exercise of legislative discretion. Accordingly, under subsection (d), when there were two persons holding valid certificates for electric operations in separate areas in Winona, as extended, these certificate holders had the right to carry on their operations in their respective certificated areas within the municipality, without making further application to the Commission for extensions and additions of their facilities, within their respective certificated areas.

The reference in subsection (d) to "respective certificated areas" reflects a legislative intent to exempt the holder of a certificate, and not the holder of a municipal franchise. Throughout Section 5, the statute uses the words "certificate" and "franchise" correctly and distinctly. If the legislature had intended to exempt the holder of a municipal franchise, then it would have used the term "municipal franchise" instead of the word "certificate." When it referred to extensions "within their respective certificated areas," it intended areas which had

been certificated by the Commission, not areas for which a municipal franchise only had been issued. If it had intended the latter, it would have said so.

Furthermore, subsection (b) made it mandatory for the Commission to issue a certificate to Delta for the areas it was serving outside the then corporate limits of Winona. The legislature knew that corporate limits sometimes expand. If it had intended the Commission should not issue certificates for areas near corporate limits, in view of possible future expansions, then presumably it would have so stated, and not used the mandatory language of subsection (b).

The phrase "municipal franchises" is used numerous times in Section 5. Yet it does not provide that when a certificated area is taken within a municipality, the Commission's certificate would be cancelled. The clear inference is that the legislature did not intend that result. Moreover, there is no provision that, after a certificate has been issued by the Commission, it shall be necessary, after corporate limits are extended, for a municipal franchise also to be obtained.

Nor is there any direction that a municipal expansion shall cancel or in any way affect a Commission certificate. The exclusive method for cancellation of such a certificate is prescribed in subsection (f), Section 5, where a utility is not rendering reasonably adequate service, and fails to do so after ordered to correct it. Yet Company's argument would add an additional ground for cancellation of a Commission certificate, namely, where a municipality has extended its corporate limits into a previously certificated area. The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods. 50 Am. Jur., Statutes, Secs. 244-

46; Tepper Bros. v. Buttross, 178 Miss. 659, 664, 174 So. 556 (1937).

The next to last sentence of subsection (e) contemplates power associations operating within a city and paying for that privilege. It says that any co-operative operating "within *any area of* a municipality" shall pay it two percent of gross revenue from inside sales. Furthermore, the first sentence of Section 5 provides that no person shall construct, acquire or operate equipment for distribution of electricity "without first having obtained from the Commission a certificate." There is no exception which would authorize a municipality, by issuing a franchise, to excuse this requirement of a certificate.

Subsection (e) recognizes that a public utility, which holds "a certificate of convenience and necessity granted under the provisions of this act covering the geographical area of such municipality," may after the expiration of a "municipal franchise" continue to use the streets upon condition of payment of compensation therefor at the rate of two percent of sales to customers within the city. Nevertheless, the utility must have a certificate from the Commission.

Subsection (g) of Section 5, upon which Company particularly relies, has a restricted application. It constitutes a limitation on the Commission, as of the time of issuing a certificate, for an area which at that time is in a municipality. It prohibits the Commission from issuing to a utility a certificate for an area *then* in a municipality, unless the utility has a franchise from the municipality. It presupposes the pending application is for a certificate. Here Delta is not seeking a certificate for any service territory. It already has a valid certificate covering the disputed tract, granted to it by the Commission before the expan-

sion of the city limits, and at a time when no part of the area was within the corporate limits.

Subsection (g) also presupposes that an applicant for a certificate within a municipality has a municipal franchise, which it must attach to its application. Moreover, it does not require that any further application be filed after a certificate is once granted by the Commission. This construction is further supported by the third sentence of subsection (g). It states that if a municipality arbitrarily refuses to grant a franchise to a utility "now operating within said municipality," then the utility can obtain a Commission certificate for a municipal area without having a franchise. See Miss. Valley Gas Co. v. City of Jackson, 236 Miss. 81, 109 So. 2d 637 (1959). The phrase "now operating" refers to the effective date of the Act, March 29, 1956. No similar relief was provided for a utility holding a certificate for an area outside of a municipality, which is taken into it after that date, and the franchise arbitrarily is denied. This omission warrants the conclusion the legislature intended that, when a certificate was once validly granted, (as it was to Delta), it would remain valid even though the area was subsequently annexed by a municipality; and that such annexation would not make it necessary for the utility to apply again for the area already certified to it. If that were not so, the legislature as a matter of equality would have afforded presumably the same relief from arbitrariness to a utility whose certificated area was brought into a city by a municipal expansion.

III.

In the drafting of Section 5 of the Act, the legislature was aware manifestly of municipal franchises, Commission certificates, and extensions of corporate limits. It mentioned all of them in the Act. If it had intended that

extension of municipal limits would cancel, modify, or affect in any way a certificate of convenience and necessity from the Commission, it no doubt would have provided for such cancellation. There is no such directive. To read into the Act a requirement that any extension of municipal limits would cancel *pro tanto* a certificate from the Commission would be unwarranted.

Moreover, it would impute to the legislature an intent inconsistent with its purpose to avoid duplicating facilities. The dominant policy which the legislature had in view must be considered. See Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768 (1935); Sheffield v. Reece, 201 Miss. 133, 143, 28 So.2d 745 (1947); Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 510-511, 62 So. 2d 772 (1953). This maintains the *status quo* in the disputed area.

Subsection (d) authorizes two electric utilities to serve separate certificated areas in the same municipality. This would result in no duplication or inconvenience, the legislature apparently concluded, although the contrary might well be the case where two transit companies are serving in one city. At any rate, subsection (d) of Section 5 makes it clear that two utilities may hold certificates from the Commission for separate areas in the same municipality. The legislative history in the Senate, as reflected in the Journal, is too sketchy and indefinite to be of assistance in the Act's interpretation on the present issues. Miss. Senate Journal, 1956, pp. 327, 329, 353-359, 391, 405-408, 510, 540-542, 575. Moreover, the statute as finally enacted is the controlling guide.

A municipality in Mississippi is a creature of the State. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant

utility franchise and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs. 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation.

All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to Company, did not supersede Delta's certificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power over areas then outside of municipalities, nor its power to control and regulate municipal activities.

Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. So. Bell Tel. & Tel. Co. v. Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

IV.

Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise

of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26 (d) (scope of review).

There was no error in the Commission's overruling Company's plea to its jurisdiction, and the motion to dismiss Delta's petition. Appellant did not seek any relief against the City of Winona. It only sought an order directing Company to remove its lines in the disputed area, relying upon its certificate from the Commission. Hence the city was not a necessary party to the suit. Moreover, at Company's instance, the Commission struck from Delta's pleading allegations attacking validity of the franchise, and properly ruled that it had no power to pass upon that issue.

Stegall v. City of Jackson, 141 So. 2d 236, 143 So. 2d 298 (Miss. 1962), does not affect this case. It held only that land developers who, without authority, laid sewer lines in streets and county roads, without any recorded reservation, dedicated that system to the public use, and could not recover its value from the city which annexed the area. However, *Stegall* (141 So. 2d at 241) referred to Gwin v. City of Greenwood, 150 Miss. 656, 115 So. 890, 58 A.L.R. 849 (1928), which has some relevancy here. There the owner of a subdivision outside of the city limits dedicated the streets, but reserved the exclusive right to operate water and sewer lines thereon. Later the city extended its boundaries to include this area. It was held

the municipality had no right to enjoin Gwin from interfering with its extension of water mains. The reservation in the dedication reserved in the dedicator a private right of property, wher the reservation was made before the area was brought into the city limits.

Appellees argue as analogous precedents from other states several cases in which municipalities have extended their boundaries, affecting previously acquired utility rights in the annexed area. Farmers Electric Co-op. Corp. v. Ark. Power & Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act. No. 85, and Ark. Laws 1957, Act. No. 103; Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944); Omaha Transit Co. v. Briggs, 167 Neb. 703; 94 N.W.2d 461, 28 PUR 3d 26 (1959); Whitaker v. Louisville Transit Co., 274 S.W. 2d 391 (Ky. 1954); Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N.E. 170 (1933); Deneen v. Houghton Co. St.-Ry. Co., 150 Mich. 235, 113 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); Public Service Co. v. Public Utility Comm. of Colo., 142 Colo. 135, 350 P. 2d 543 (1960); Clarke-Washington Elec. Membership Corp. v. Ala. Power Co., 272 Ala. 598, 133 So. 2d 488 (1961). These cases are not persuasive here. They are based essentially upon the particular statutes and constitutional provisions of the specific states. They involve issues and statutes different from those arising under the Public Utility Act of 1956.

In summary, on the direct appeal by Delta, the judgment of the chancery court, which reversed and set aside the order of the Public Service Commission, is reversed. The order of the Commission is reinstated and affirmed. Appellees' cross appeal on the jurisdictional issue is without merit. Hence on the cross appeal the case is affirmed.

ON DIRECT APPEAL, REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED: ON CROSS APPEAL, AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "1-B"

No. 42,480

IN THE SUPREME COURT OF MISSISSIPPI
CAPITAL ELECTRIC POWER ASSOCIATION

Vs.

MISSISSIPPI POWER & LIGHT COMPANY AND
CITY OF CLINTON, MISSISSIPPI, ET AL.

KYLE, JUSTICE:

This case is before us on appeal by Capital Electric Power Association from a decree of the Chancery Court of the First Judicial District of Hinds County, reversing a cease and desist order issued by the Mississippi Public Service Commission on July 6, 1961, upon the petition of Capital Electric, ordering that Mississippi Power & Light Company cease and desist from rendering electric service or street lighting service in an area recently annexed to the City of Clinton, which had been certificated to Capital Electric by the Public Service Commission.

The record shows that Capital Electric Power Association is a Mississippi Corporation organized and existing under authority of the Electric Power Association Act of 1936, Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is a public utility engaged in the transmission and distribution of electricity for lighting, heating and power purposes, and is vested with authority to operate electric services both in and without municipalities. Code Sec. 5478(8). It has the power of eminent domain. Sec. 5474 (16) (14). Capital Electric operates in parts of seven counties in the

central part of the state, including the area lying east of the City of Clinton in Hinds County, and is obligated to render nondiscriminatory service to all persons living in its service areas who apply for such service.

The area involved in this controversy is an area approximately 1/4 mile wide, east and west, and 1/2 mile long, north and south, lying immediately east of the corporate limits of the City as the same existed prior to March 25, 1960. The area is bounded on the north by the right of way line of Clinton Boulevard, on the west side by the city limits as they existed prior to March 25, 1960, and on the south by old U.S. Highway No. 80, and on the east by the north-south half section line running through Section 28, Township 6 North, Range 1 West. The area is referred to in the record and in the briefs filed on this appeal as the "disputed area"; and will be referred to by us in the same manner.

The record shows that Capital Electric began to furnish electric service to persons desiring such service in the disputed area in 1944, and has continued to serve all persons applying for such service since that time. Lines have been added as needed. Such service was being furnished to 14 subscribers, including residential, church and commercial, at the time of the hearing of this cause. Neither Mississippi Power & Light Company nor any other electric utility had ever furnished electric service to subscribers in the area prior to the annexation of the area by the City of Clinton on March 25, 1960, except residents of two dwelling houses located on the extreme northern edge for which electric service had been provided by the Company for two of its employees prior to the enactment of Ch. 372, Laws of 1956, and which were "frozen" by agreement of the parties and an order of the Public Service Commission dated September 21, 1959.

The record shows that, after the enactment of the Public Utility Act, Ch. 372, Laws of 1956, which became effective March 29, 1956, Capital Electric filed with the Public Service Commission under authority of paragraph (b) of Section 5 of the Act, commonly called the "grandfather" clause, its application for a certificate of public convenience and necessity authorizing it to continue its operations as a public utility serving the designated areas which were being served by it on the effective date of the Act. The application was entered upon the docket of the Commission as Docket No. U-84. Mississippi Power & Light Company was made a party to the proceeding. After extended negotiations between Capital Electric and the Company for the settlement of area claims, the Commission, by an order entered in Docket No. U-84 on September 21, 1959, granted to Capital Electric a certificate of public convenience and necessity, covering the areas which were being served by it on the effective date of the Act, including the area involved in this controversy. The area certificated to Capital Electric as its service area was described in the order of the Commission by metes and bounds and included the area involved in this controversy. No petition for a rehearing was filed, and no appeal was taken from the final order of the Commission in that matter; and thereafter Capital Electric continued to furnish electric service to its subscribers in the area. The record shows that Capital Electric does not have and has never had a municipal franchise in the City of Clinton. It does not have and has never had a street lighting agreement with the City of Clinton. However, the record shows that a written offer was made by Capital Electric to the City on August 23, 1960, to furnish street lighting service to the City in the disputed area on the same terms as such service was being rendered by Mississippi Power & Light Company.

The record shows that the appellee, Mississippi Power & Light Company, hereinafter referred to as the Company, is an investor-owned public utility incorporated under the laws of the State of Florida and qualified to do business in the State of Mississippi. All of its property is located in the western half of the state. Its general offices are located in the City of Jackson. The Company has operated in Mississippi since 1924. Its current franchise, authorizing the use of the streets, highways and public places in the City of Clinton, was granted by the City on December 6, 1946, for a period of 25 years. On December 16, 1946, the governing authorities of the municipality approved an exclusive street lighting contract with the Company, which provided that, "Company will furnish and municipality will take and pay for its entire street lighting service during the term of this agreement." The contract had been in effect continuously from December 16, 1946, to the date of the hearing.

On November 25, 1959, the Public Service Commission, in Docket No. U-44, granted to the Company a "grandfather" certificate of public convenience and necessity, pursuant to the provisions of paragraph (b) of Section 5, of the Public Utility Act, covering numerous areas in various parts of the state, including the area lying within the corporate limits of the City of Clinton, but not including the area involved in this controversy which at that time was not a part of the City. As in the case of Capital Electric, the Company's "grandfather" certificate described the service areas of the utility by metes and bounds.

The events leading up to the filing by Capital Electric of its petition against the Company in this cause asking for a cease and desist order were substantially as follows: The decree of the Chancery Court of the First Judicial

District of Hinds County, approving the extension of the city limits of the City of Clinton so as to include within the City the area involved in this controversy, along with certain other small areas lying outside of the City, became final on March 25, 1960. On May 3, 1960, the mayor and board of aldermen of the City adopted a resolution authorizing the mayor and clerk to execute in behalf of the City a supplemental agreement with the Company for the furnishing of street lighting in the newly annexed territory. The city clerk thereupon addressed a letter to the Company's manager designating certain locations for new street lights to be installed by the Company on Morrison Drive, and on May 16, 1960, the Company's workmen entered the disputed area and erected a distribution line covering a distance of 1775 feet. The line entered the disputed area on the north at the intersection of the south right of way line of Clinton Boulevard and Morrison Drive and ran in a southerly direction along Morrison Drive to the north right of way line of U.S. Highway 80. The line was built immediately across the street from Capital Electric's line and duplicated Capital Electric's line. The Company also installed five street lights, four of which were located directly across the street from street lights already provided by Capital Electric, which were then in operation. The Company also installed a permanent service line into the newly constructed residence of C. M. Kelley, where Capital Electric Service was already being used for construction purposes.

On May 25, 1960, Capital Electric filed its petition in this cause with the Public Service Commission and asked that, upon the hearing of the petition, the Commission enter an order directing the Company to remove the line so constructed by it in the disputed area, and directing that the Company cease and desist offering its service to serv-

ice locations or constructing service facilities within the disputed area. Capital Electric also asked for general relief.

The Company filed its answer to the petition on July 22, 1960. In its answer the Company admitted that on May 16, 1960, it had built the line in question within the disputed area, and that it had served the owner of one residence from that line and had also installed along Morrison Drive five street lights. As matters of affirmative defense, the Company alleged that it was operating under a franchise from the City of Clinton dated December 16, 1946, which was a 25-year franchise and that the rights and obligations conferred by the City upon the Company by that franchise were protected by Ch. 372, Laws of 1956, and particularly by paragraph (g) of Section 5 thereof. The Company further alleged that it was the only supplier of electric energy operating in the City or any part thereof to which a franchise had been granted by the City, and that it was paying the City two per cent of its domestic and commercial receipts derived from its operations within the City. It alleged that Capital Electric had applied to the City for a franchise, and that the mayor and board of aldermen had refused to grant the same.

The Company further alleged that it had received on November 25, 1959, in Cause No. U-44, a "grandfather" certificate to serve the City of Clinton, pursuant to Section 5(b) of the Public Utility Act; that it had an exclusive street lighting contract with the City under which it was presently operating; that its right to furnish electric service in the area which had been incorporated into the city was protected by the due process clause and equal protection clause of the Constitution of the United States and the due process clause of the Mississippi Constitution. The Company alleged that it had offered to purchase from Capital Electric, or to trade with Capital Electric for other

facilities located elsewhere, all facilities which Capital Electric had in the City of Clinton. The Company incorporated in its answer a cross petition in which it asked that Capital Electric be ordered to cease and desist from maintaining its electric distribution service in the disputed area, and to remove its equipment and distribution facilities from the area.

The Mississippi Municipal Association filed a petition asking that it be permitted to intervene on behalf of the municipalities of the state as parties interested in the litigation. The City of Clinton also filed a petition asking that it be permitted to intervene as an interested party. Both petitions were granted by orders of the Commission dated September 16, 1960. The Municipal Association then filed its answer to the petition of Capital Electric; and the City of Clinton filed an answer and cross-petition in which it averred that Capital Electric had no right to continue to operate its facilities in the disputed area after March 25, 1960, for the reason that it had never been granted a franchise to operate within the City.

Extended hearings were held by the Public Service Commission on the issues presented by the pleadings. The hearings were concluded on February 27, 1961. The Commission took the case under advisement, and on July 6, 1961, the Commission rendered its decision in favor of Capital Electric and entered a cease and desist order as prayed for in Capital Electric's petition. The relief prayed for in the cross petitions filed by Mississippi Power & Light Company and the City of Clinton was denied, and the cross petitions were dismissed.

The Commission in its order found that Capital Electric had been granted a certificate of convenience and necessity by the Commission in Docket No. U-84 on September 21, 1959, which authorized it to continue to operate

its electric facilities and serve the needs of electric consumers in the area that it was serving on March 29, 1956, the effective date of the Public Utility Act; that the certificate of convenience and necessity contained a particular description of the area involved in this litigation; and that continuously, since March 29, 1956, Capital Electric had been rendering reasonably adequate electric service within the area. The Commission found that the new facilities constructed by Mississippi Power & Light Company in the disputed area were within the areas specifically certificated to Capital Electric by the Commission in Docket No. U-84; and that the Company, unless ordered to cease and desist therefrom, would offer and render electric service to consumers of electric power within the disputed area, and would continue to render street lighting service within the area; that the real issue in the controversy was whether or not the holder of a certificate of convenience and necessity issued by the Commission was entitled to be protected against an invasion of its certificated area by the construction and operation of electric facilities therein by another electric utility which did not have a certificate authorizing it to serve the area. The Commission was of the opinion that the municipal franchise granted to the Company by the City of Clinton was not germane to any of the issues in the cause and had no bearing on the case. The Commission did not pass upon the validity of the franchise or attempt to construe its provisions.

The Commission, by an order duly entered upon its minutes, ordered that the respondent, Mississippi Power & Light Company, cease and desist from rendering any electric distribution service or street lighting service in the disputed area, and that the Company remove "all of its electric lines and facilities, which it has constructed

and is now operating and maintaining within the disputed area," within a period of 30 days from the date of the order. In its order the Commission stated that its decision was based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket Nos. U-44 and U-84; that the first certificate did not include the disputed area; that the second certificate did include the area in question. From that order the respondent, Mississippi Power & Light Company, prosecuted an appeal to the Chancery Court of the First Judicial District of Hinds County. The City of Clinton and the Mississippi Municipal Association likewise prosecuted appeals.

The cause was heard by the chancery court as an intermediate court of appeals upon the voluminous record made during the hearing before the Commission, and on April 20, 1962, that court entered a judgment reversing the order of the Public Service Commission and ordering that the petition of Capital Electric for a cease and desist order be dismissed. The court was of the opinion that the order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton; that, when the City of Clinton extended its corporate limits and annexed adjoining areas which included the disputed area in this cause the certificate of convenience and necessity granted to Capital Electric under the Public Utility Act of 1956, in so far as it covered the disputed area, became ineffective and Capital Electric could not operate within the corporate limits of the City inasmuch as it had not been granted a franchise by the City. The cause is now before us on appeal by Capital Electric from the judgment entered by the chancery court reversing the order of the Commission.

The attorneys for Capital Electric have assigned and argued four main points as ground for reversal of the judgment of the lower court:

(1) That the court erred in holding that when the City of Clinton expanded its corporate limits on March 25, 1960, and annexed the disputed area, the certificate of public convenience and necessity theretofore issued by the Public Service Commission to Capital Electric, under and pursuant to Section 5(b) of the Public Utility Act of 1956, became ineffective in so far as it covered the disputed area; (2) that the court erred in holding that the expansion of the corporate limits of the City of Clinton on March 25, 1960, destroyed the vested service rights acquired by Capital Electric by virtue of its having served the disputed area for many years prior to that date, which rights had been recognized and expressly reserved and granted to Capital Electric by the terms of the Public Utility Act itself; (3) that the court erred in holding that Capital Electric was barred of its right to operate within the disputed area after the annexation by the City for the reason that Capital Electric had not been granted a municipal franchise by the City; (4) that the court erred in its holding that the cease and desist order of the Commission issued on July 6, 1961, was erroneous in law and violative of the statutory rights of Mississippi Power & Light Company and the City of Clinton.

It is argued on behalf of the appellees in support of the judgment of the lower court that the statutes of Mississippi in unmistakable terms, have given to municipalities complete jurisdiction of streets and the absolute right to regulate by franchise the use which can be made of the streets by public utilities; that the power to determine what utilities may operate within and use the streets and public ways of a municipality is definitely vested in the

municipality by Sections 3374-119 and 3371-120, and Section 3374-73, Miss. Code of 1942, Rec.; and that only those acquiring and holding a franchise from the municipality itself can operate a utility therein. It is also argued on behalf of the appellees that it clearly appears from the language used in paragraph (g) of Section 5 of the Public Utility Act that it was the legislative intent that a utility should not be permitted to operate within a municipality without first obtaining a franchise from the municipality; that Capital Electric had not been granted a franchise by the City of Clinton, and for that reason the chancery court was eminently correct in its holding that Capital Electric should no longer be permitted to operate in the disputed area since the area had been annexed to and made a part of the City.

The questions of law presented for our decision on this appeal are substantially the same as the questions presented in Delta Electric Power Association v. Mississippi Power & Light Co., et al., Cause No. 42,535, decided by this Court on February 11, 1963. There is no substantial dispute as to the facts in this case, and on the questions of law the opinion rendered in the Delta Electric Power Association Case is controlling here. We think there was error in the court's holding that the cease and desist order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton. We also think that there was error in its holding that the extension of the corporate limits of the City of Clinton so as to include the disputed area within the City rendered ineffective as to that area the certificate of convenience and necessity granted to Capital Electric under authority of paragraph (b) of Section 5 of the Public Utility Act, and in its holding that Capital Electric was barred of its right to operate within the disputed area after its annexation to the City without first obtaining a franchise from the City.

As stated by the Court in the opinion rendered in the Delta Electric Power Association Case, prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of "grandfather" certificates under Section 5 are made on an area rather than a facility basis; and (2) a certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts. Capital Electric Power Association v. Mississippi Power & Light Co., 240 Miss. 139, 125 So.2d 739; Mississippi Power Co., et al v. East Mississippi Electric Power Association and Public Service Commission (Miss. 1962), 140 So.2d 286.

In Capital Electric Power Association v. Mississippi Power & Light Co., supra, which is generally referred to as the "Elton Case," the Court, in discussing the nature of the right acquired by Capital Electric by virtue of the certificate of convenience and necessity issued to it under paragraph (b) of Section 5 of the Public Utility Act, said: "Capital Electric Power Association is a corporation chartered and operated under Chapter 184, Laws of 1936, Section 5463 et seq., Code of 1942. It is obligated to render nondiscriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor. Capital Electric Power Ass'n. v. McGuffee, 226 Miss. 227, 83 So.2d 837, 84 So.2d 793, 56 A.L.R. 2d 403. Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable one. 'A non-exclusive franchise is a valuable right which can be protected in the courts.'"

In the Delta Electric Power Association case, the court had under consideration the effect of the annexation by the City of Winona of an area lying west of the City, which constituted a part of the service area certificated to Delta Electric by the Public Service Commission and which the Company claimed under a municipal franchise granted by the City many years prior to the annexation; and in its opinion in that case the Court said: "Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not consistent with the terms of the Act or with the legislative purposes."

What was said in the Delta Electric Power Association case is equally applicable to the facts in this case. The Public Utility Act, in our opinion, is not susceptible of the construction contended for by the appellees and adopted by the lower court, that, when the City of Clinton extended its corporate limits and annexed the disputed area the certificate of convenience and necessity granted to Capital Electric under paragraph (b) of Section 5 of the Act, in so far as it covered the disputed area, became ineffective. If the legislature had intended that awards by the Commission of service areas under the "grandfather" clause of Section 5 of the Act should be only tentative and subject to change in the event a portion of the certificated

area lying outside of a municipality on the effective date of the Act should be thereafter incorporated in a municipality, the legislature in our opinion would have expressly provided for such change and for payment of compensation to the utility whose rights were adversely affected.

As to the appellees' contention that paragraph (g) of Section 5 of the Public Utility Act indicates a legislative intent that a utility shall be required to obtain a franchise from the municipality before operating therein, we think that contention has been fully answered in the opinion rendered in the Delta Electric Power Association case. There is nothing in paragraph (g) of Section 5 to indicate that a utility which has obtained and is operating under a certificate of convenience and necessity issued by the Commission shall have its certificate revoked in whole or in part, or shall be required to apply for another certificate of convenience and necessity, if a part of its certificated area is later incorporated into a municipality.

It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, par. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case.

For the reasons stated above the judgment of the lower court, which reversed and set aside the order of the Public Service Commission, is reversed; and the order of the Public Service Commission is reinstated and affirmed.

REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "1-C"

No. 59,701

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
MISSISSIPPI POWER & LIGHT COMPANY,
APPELLANT,

VS.

DELTA ELECTRIC POWER ASSOCIATION,
APPELLEE.

Opinion of the Court

Appellee, Delta Electric Power Association, holds a certificate of convenience and necessity in the disputed area. When this certificate was granted the area in dispute was not in the corporate limits of the City of Winona. The Appellant, Mississippi Power and Light Company, holds a certificate of convenience and necessity in the corporate limits of the City of Winona and other area not in dispute, and in addition thereto is a holder of a municipal franchise for the operation of its utility in said city.

The granting of a franchise to a public utility to operate in a municipality is governed by Section 3374-73 of the Mississippi Code of 1942, as recompiled and amended. Such a franchise and right can be given only by a majority of the qualified electors of a municipality voting thereon at a general or special election. There is also a limitation of twenty-five years as the effective date of such a franchise. It is the opinion of the Court that Chapter 372 of the Laws of Mississippi, 1956, does not repeal, change or modify Section 3374-73 or divest municipalities of this

jurisdiction and does not repeal or modify or change the jurisdiction of a municipality over the use of the streets and public places by a public utility.

The extension of the corporate boundaries of the City of Winona carried with it all the duties and responsibility of the City of Winona over the new area and also carried into the new area the franchise rights of the Mississippi Power and Light Company to operate its facilities therein. The Appellee, Delta Electric Power Association, was lawfully operating its facilities in the disputed area prior to this extension of the corporate boundaries but did not and does not have a municipal franchise as required by statute.

Therefore, it is the opinion of the Court that the Petition of the Appellee, Delta Electric Power Association, should be dismissed and the Cross Bill of the Appellant, Mississippi Power and Light Company, sustained.

Because the Appellee was lawfully operating in the disputed area on the date of the extension of said city limits, due compensation should be paid for the facilities existing as of the effective date of the Ordinance of the City of Winona extending its geographical limits or a reasonable time given for the removal of all of its facilities.

An Order may be entered herein consistent with this Opinion.

/s/ J. C. Stennett
Chancellor

APPENDIX "1-D"

Number 59,700

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, STATE OF MISSISSIPPI

MISSISSIPPI POWER & LIGHT COMPANY, CITY OF CLINTON, MISSISSIPPI, AND MISSISSIPPI MUNICIPAL ASSOCIATION, APPELLANTS,

VS.

CAPITAL ELECTRIC POWER ASSOCIATION, APPELLEE.

Memo Opinion

In construing our Mississippi Public Utilities Act, Chapter 372 of the Laws of 1956, Sections 7716-01, et seq., of the Mississippi Code of 1942, Recompiled, along with Sections 3374-129, 3374-119, and 3374-73 of the Mississippi Code of 1942, it is our humble judgment that when the City of Clinton expended its corporate limits and annexed adjoining area, which included the disputed area in this cause, that the Certificate of Convenience granted the appellee under the Act of 1956, supra, insofar as it covers the disputed area, became null and void and of no effect, and before the appellee can operate within the corporate limits of Clinton, it must secure a franchise from the City of Clinton.

We hold that the City of Clinton and its qualified electors have exclusive jurisdiction to decide who and what public utility or utilities may operate within the corporate limits of Clinton.

It is needless to say any and all actions taken in the premises by the City of Clinton are subject to review by any court of competent jurisdiction.

An order may be entered reversing and dismissing the petition and cross-petition filed with our Public Service Commission in this cause.

Respectfully yours,

Signed W. T. Horton
Chancellor.

APPENDIX "2"

Section 3375, *Mississippi Code of 1942*:

> "The corporate name of a city shall be 'The city of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which the place is commonly known); and by such name may sue and be sued and suits against any municipality shall be instituted in the county in which such municipality is situated where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

Section 3374-02, *Recompiled Mississippi Code of 1942*:

"The corporate name of a city shall be 'The City of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which such municipality has been legally designated); and by such name may sue and be sued, and suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

APPENDIX "3"

Section 3376, *Mississippi Code of 1942*:

"The limits and boundaries of the existing cities, towns and villages, shall remain as now established until altered, as herein provided: To enlarge or contract the boundaries of a city or town or village by adding thereto adjacent unincorporated territory, or excluding therefrom any part of the incorporated territory of such municipality, it shall be necessary for the municipal authorities to pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits and also defining the entire boundary as changed. Any two or more cities or towns situated and being adja-

cent or sufficiently near each other may combine into and become one municipality, in which event it shall be necessary for the municipal boards of mayor and aldermen of each of said municipalities so proposed to unite into one municipality to pass an ordinance at a regular meeting of said boards, declaring the intention of the said city or town to unite with such municipality, or municipalities, as it is proposed to combine into one municipality, defining with certainty the name of the municipality that shall be formed and the territory which it includes when so formed, and the entire boundary thereof, provided that the provisions of this section shall not apply to towns or villages with a population of less than three hundred, unless the territory which it is proposed to add to and include in the corporate limits of such towns or villages shall have been surveyed and platted into lots and blocks, and a map thereof duly recorded, and unless four-fifths of the property owners of said territory shall petition the municipal authorities of such towns or villages to add such territory to and include the same in the corporate limits of such towns or villages; and no cities or towns shall combine into one municipality where their present corporate limits are more than three miles apart."

Section 3374-10, *Recompiled Mississippi Code of 1942*:

"The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall in

general terms describe the proposed improvements to be made in the annexed territory and the manner and extent of such improvements and the approximate time within which such improvements are to be made, and such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement of the reasons for such contraction and a statement showing whereby the public convenience and necessity would be served thereby."

APPENDIX "4"

Section 7716-01, et seq., *Recompiled Mississippi Code of 1942*, the Public Utility Act of 1956, especially Sections 7716-05, 7716-06(b) and 7716-38:

"No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D(3) of section 1 (§7716-01), of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

"(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

"(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

"(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facili-

ties outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

"(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

"(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential

and commercial customers within said municipality, in case of a utility defined in section 1D(1) and 1D(2) (§7716-01) and in the case of a utility defined in 1D(3) (§7716-01) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

"(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder

of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

"(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 (this section) hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

"In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said mu-

nicipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

"In the case of a public utility as defined in section 1D(3) (§7716-01) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided."

Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

APPENDIX "5"

Section 88, *Mississippi Constitution of 1890*:

"The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

APPENDIX "5-A"

Section 2780, *Recompiled Mississippi Code of 1942*:

"All companies, associations of persons, municipalities, associations of municipalities, or natural gas districts, incorporated or organized for the purpose of building or constructing pipe lines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipe lines and appliances along or across highways, waters, railroads, canals, and public lands, above or below grounds, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands. The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and all such companies, associations of persons, municipalities, associations of municipalities or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof."

APPENDIX "6"

An Ordinance

Granting an Electric Franchise to Mississippi Power & Light Company, its Successors and Assigns, in the City of Winona, Mississippi, Fixing

the Terms Thereof, Prescribing the Obligations Thereasto, and for Other Purposes.

BE IT ORDAINED By the Mayor and Board of Aldermen of the City of Winona, Mississippi, lawfully assembled:

SECTION 1. In consideration of the benefits that will accrue to the municipality and the inhabitants thereof, Mississippi Power & Light Company, a corporation, (hereinafter called Grantee) is hereby vested with full right, authority, easements, privileges and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain, operate and conduct in said municipality a plant or plants and a system for the manufacture or distribution of electric current for all purposes whatsoever, for a term of twenty-five years from date of passage.

SECTION 2. The Grantee is hereby further given and vested with full right, authority, easements, privilege and franchise to construct, re-construct, erect, suspend, install, renew, maintain, operate and conduct in said municipality a system of poles, towers, conduits, cables, conductors, transformers, fittings, and all appliances and appurtenances now, or hereafter, during the life of this franchise, necessary or desirable to the transmission, distribution, and/or sale of electric current, for all purposes whatsoever, in, over, under, along, upon and across all streets, alleys, ways, bridges and public places and other municipal property in said municipality, as they now exist, or may hereafter be laid out or extended, together with the further full right, privilege, easement, authority and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain and operate said poles, towers, conduits, cables, conductors, transformers, fittings and all other appliances and appurtenances now or hereafter, during the life of this franchise, necessary or desir-

able for the transmission within, through and over and beyond said municipality, and to electricity consumers, both within and beyond the limits thereof, electricity for lighting, heating, power and all other purposes for which electricity may be now, or hereafter used, and for the purpose of extending its system beyond the limits of the municipality as they now may, or may hereafter exist.

SECTION 3. The poles, towers, conduits, cables, conductors, transformers, fittings, appliances and appurtenances, whether now in use or hereafter devised, shall be constructed so as not to unreasonably interfere with the proper use of the streets, avenues, alleys, ways, bridges, public places and grounds in said municipality, the municipality to approve location of same, and same shall be moved at expense of Grantee when necessary for paving, and shall be maintained in a reasonably safe condition and repair.

SECTION 4. Grantee may, from time to time, declare, make and enforce reasonable rules and regulations as a condition for the sale or distribution of electric current by it to the municipality, or any consumer therein or thereabouts during the life of franchise.

SECTION 5. In the event the supply of electric energy should be interrupted or fail by reason of accident, or otherwise, beyond the control of Grantee, the Grantee shall restore the service within a reasonable time, and such interruptions shall not constitute a breach of this franchise, nor shall the Grantee be liable for damage by reason of such interruptions or failure.

SECTION 6. Grantee will pay to the municipality a sum of money equal to two per cent (2%) of the receipts of the Grantee from the sale of electric service at retail for residential and commercial purposes (sales tax

excluded) within the corporate limits of the municipality as shown by Grantee's billing records, such payments to be due quarterly and the annual aggregate amount of such payments shall not be less than $100. Provided, however, the obligation to make said payment is conditional in that the full amount specified shall be paid during the term of this franchise unless and except should there be collected by the municipality from the Grantee any new taxes of any nature whatsoever imposed subsequent to the date of this franchise, or should there be an increase in the rates of any taxes now being collected by the municipality (except advalorem taxes now authorized by law), then the payment herein provided to be made by the Grantee to the municipality will be decreased by such amount.

SECTION 7. The Mayor and Clerk are authorized to execute, upon the part of the municipality, all requisite contracts with Grantee which have been approved by the Mayor and Board of Aldermen.

SECTION 8. The Clerk shall publish this ordinance according to the requirements of law, as soon as practicable after the passage hereof, and Grantee shall pay to said Clerk any and all costs and expenses of such publication.

SECTION 9. If any clause or section of this ordinance is illegal, or is not embraced within the title hereof, or is not cognate to the subject expressed in the title, the remaining provisions hereof shall not be thereby affected, but shall have full force and effect.

SECTION 10. This ordinance shall take effect from and after its passage; but Grantee shall not be bound hereby if within 30 days from and after this date it declines in writing to accept this grant. The foregoing ordi-

nance was reduced to writing and proposed and introduced by Alderman W. S. Gerard, and was read, considered and voted upon by sections and as a whole; the vote on each and all of the sections, and upon the ordinance as an entirety, was taken by "yea" and "nay" vote, those voting "yea" being as follows: Aldermen J. E. Allen, Kennedy Bryan, W. S. Gerard, E. A. Hammond, and James L. Shelton, and those voting "nay" being: Aldermen: None, ..., and was adopted on this the 23rd day of February, 1948.

/s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. A. Hammond
Clerk

SEAL

APPENDIX "7"

Street Lighting Agreement

Between

Municipality of Winona, Mississippi

and

MISSISSIPPI POWER & LIGHT COMPANY

THIS AGREEMENT made and entered into this the 23rd day of February, 1948, by and between the Municipality of Winona, Mississippi, a municipal corporation, hereinafter called "Municipality", and MISSISSIPPI POWER & LIGHT COMPANY, hereinafter called "Company"

WITNESSETH:

In consideration of the mutual covenants contained herein it is agreed as follows:

1. Company will furnish and Municipality will take and pay for its entire street lighting service during the term of this Agreement in accordance with Rate Schedule SL-4 &, SL-5 attached hereto and made a part hereof.

2. The service to be furnished as of the date of this Agreement consists of the following equipment:

A. Owned and Maintained by Company

(1) Overhead Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	49
2,500	52
4,000	
6,000	
10,000	

(b) Luminaires:

Radial wave reflectors or equivalent	101
Open suburban reflectors	
Small Pendant globe	
Center suspension units	5
Mast arms over 8 ft., no. of ft. over 8	

(c) Wood Poles 7

(d) Overhead Supply Lines, Circuit Ft. 43,400

(2) Whiteway Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	
2,500	
4,000	
6,000	
10,000	

(b) Luminaires

(c) Standards

(d) Supply Lines:
Overhead, circuit ft.
Underground, circuit ft.

B. Owned and maintained by Municipality except that Company shall furnish and replace lamps—

No. of Fixtures	Size of Lamp	No. Lamps per Fixture
19	2500 Lumens	One

3. Additional street lighting service other than as provided herein requiring the installation of additional facilities shall be by a supplementary agreement in writing and approved by an authorized official of the Municipality and an authorized official of the Company.

4. Payments are to be made by Municipality on or before the 10th day of each month for service rendered during the preceding month, and in case of failure to pay on or before that time, service may be discontinued by Company without terminating this contract, or waiving or impairing any of the right accruing to Company hereunder.

5. The Company shall use reasonable diligence to furnish continuous service hereunder but shall not be liable to the Municipality, or its inhabitants for failure to de-

liver service hereunder for causes reasonably beyond its control.

6. The term of this Agreement shall be for five years from and after the date hereof and shall be automatically extended for a period of five years from each expiration date of such time, or any automatic extension thereof, unless and until either party shall notify the other in writing not less than 180 days nor more than 360 days prior to any expiration date of its intention to terminate this Agreement.

7. This Agreement is subject to approval of Company's Vice-President.

Executed in triplicate original on the day and year first above mentioned.

MISSISSIPPI POWER & LIGHT COMPANY
By /s/ W. W. Williams

APPROVED:

/s/ R. B. Wilson
Vice-President

MUNICIPALITY OF Winona, MISSISSIPPI
By /s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. W. Hammond
Clerk

SEAL

APPENDIX "8"

(a) The contract was validly granted by the State of Mississippi under plenary authority therefor precedently vouchsafed to the State's agency

The authorization given by the State, whereunder this contract was made, provides, Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*):

> "* * * And such municipality may contract and be contracted with and exercise and perform all municipal powers and duties."

Such franchise had to be non-exclusive and this one was, for twenty-five years. The State on the 23rd day of February, 1948, prescribed the then boundaries of Winona as that wherein the franchise would be, but for the public welfare expressly provided by Section 3376, *Mississippi Code of 1942*, (now Section 3374-10, *Recompiled Mississippi Code of 1942*) that that which now was might be extended or contracted, compare *In the Matter of the Enlargement of the Municipal Boundaries of the City of Forest, Mississippi*, Miss. , 153 So.2d 688; and when the State thus did, our franchise but repeated that specifically binding. This question is not res nova, but rests upon statutes whose verbiage was validly adjudicated seventy-five years ago. *Henry* v. *Henderson*, 103 Miss. 48, 60 So. 33. As said by Mr. Justice Shiras in *Vicksburg Waterworks* v. *Vicksburg*, 185 U.S. 65, 69, 46 L. ed. 808, 811:

> "By an act of the legislature of the State of Mississippi, approved on the 18th day of March, 1886,

> the city of Vicksburg was authorized 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, *and to that end to contract with a party or parties who shall build and operate waterworks*'."

Pursuant to this power the Mayor and Board of Aldermen passed the ordinance quoted in 185 U.S. 65, 69, 76, 46 L. ed. 808, 811, 813:

> "'Sec. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, *and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction,* * * *'*
>
> * * *
>
> "'Sec. 13. The said Samuel R. Bullock & Company, their associates, successors, or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water, as they may determine; provided, that said rates and charges shall not exceed 50 cents for each 1,000 gallons of water.'"

In *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, applied and approved by this Court in *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, the power of the State, through Jackson, was thus declared by Mr. Justice Cooper, p. 643:

"In view of the nature and character of the subject-matter of the contract which the board of mayor and aldermen of the city of Jackson was authorized to make by the third section of the act of February 29, 1888, we think the contract entered into with the appellant was within the delegation of power, so far as the time of its duration is involved. The language of the act is 'that the board of mayor and aldermen be, and they are hereby, authorized and empowered to contract with any reliable corporation, association or individual, for supplying the said city of Jackson with water and electric or gas lights, from year to year, * * *.'"

See *Meridian Waterworks* v. *City of Meridian*, 85 Miss. 515, 37 So. 927.

Mississippi's Court had decided *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, in 1895, and had further decided *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167, in 1900, and in the *Trowbridge Case*, involving this specific "now or hereafter" clause, no attack was made in this aspect. To make assurance doubly sure, this Court then decided *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed 1102, whereunder the same "now or hereafter" provision was before the Court and not challenged. Then came *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, where the same franchise was involved with the "now or hereafter" clause incorporated, and this Court found naught therein objectionable for very possibly the then counsel thought it had been, as we respectfully submit it had been, ultimately determined that when the State, acting through the Legislature, had employed the municipality as a governmental instrumentality to contract without qualification, normal contracts, then usual and customary, when made, were inviolate. Note that said, 206 U.S. 515:

"In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years; and, in the absence of a showing of unreasonableness 'so gross', as the court of Mississippi has said, 'as to strongly suggest fraud or corruption' this action of the council is binding and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party.

"While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council, and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city."

This Court must construe the authority delegated. The State, beginning with the Vicksburg statute, gave its agency the power to contract within certain guide lines; but it made by legislative fiat the action of the municipality conclusive as to its boundaries, whether they remained stationary or were to be expanded. Furthermore, this Court recently in *Arizona* v. *California*, U.S. , 10 L. ed. 2d 542, when speaking of a similar grant of power, said, p. 566:

"* * * The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.* * *."

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 533, 48 L. ed. 1102, 1107:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

When the State saw fit, with qualifications not here relevant, to vest power to contract in the municipalities and pursuant thereto the municipality, acting for the State, did contract, the Contract Clause came into play. Compare *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155.

In *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204, Wisconsin assumed to transfer ordinance contracts into indeterminate certificates without the contractee's consent. This Court thereasto said, p. 137:

> "The integrity of contracts—matter of high public concern—is guaranteed against action like that here disclosed by §10, art. 1, of the Federal Constitution: 'No state shall . . . pass any . . . law impairing the obligation of contracts.' It was beyond the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract. Vicksburg v. Vicksburg Waterworks Co. 206 U.S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Detroit United R. Co. v. Michigan, 242 U.S. 238, 253, 61 L. ed. 268, 275, P.U.R. 1917B, 1010, 37 Sup. Ct. Rep. 87. The erroneous conclusion concerning this Federal question led to the decree below. * * *"

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 48 L. ed. 1102; *Detroit United R. Co.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

With the utmost deference to Mississippi's Court, they stress the fact that on March 29, 1956, there had not been made the addition of Area "B" to Winona as at now and, therefore, that in virtue of that action not having been taken, the Legislature, who gave the entire area, was privileged to split it as against the donee who was entitled to the unity so soon as the Mayor and Board of Aldermen had exercised the power vested under Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississipi Code of 1942*). That power has been exercised. That which the Mississippi Court assumes to do is to place the Act, as at March 29, 1956, in vacuo and to tear out of the contract that which the Legislature had specifically directed and the parties had agreed upon, that when additions were made that they would be within the municipal limits and that thereover Appellant would possess that contracted for. We start with "now" (the limits on February 23, 1948, Area "A"), and then the limits on the extension, November 3, 1959, Area "B"; and that which Mississippi's Court, with deference, has not dared to deny is that in good faith under existing decisions the contract of 1948 was made. We apply the maxim, "Qui facit per alium facit per se", *Broom's Legal Maxims*, p. 818. Thereunder the State must be just to Appellant before it can be generous to Appellee. Section 3376, *Mississippi Code of* 1942, and the express provision of the franchise provided that Area "B" should be irrevocably under the contract upon November 3, 1959. The State could not legislate herself from this obligation effective until February 22, 1973. If it were possible for the State then to give that which it initially had the power to give, the Appellant has those

rights which we have asserted. Suppose the franchise had specifically provided that instead of "hereafter", "on November 3, 1959, and on and after this date", the State had conferred on Area "B" of the City that requisite to make of the city a unity and to prevent second class citizens therein. Compare *Gomillion* v. *Lightfoot*, 362 U.S. 339, 5 L. ed. 2nd 110, citing *Mobile* v. *Watson*, 116 U.S. 289, 29 L. ed. 620, and *Graham* v. *Folsom*, 200 U.S. 248, 50 L. ed. 464.

Thus the State having authorized Winona as at the 23rd day of February, 1948, to grant a franchise throughout the city as it then was and Appellant having contracted under the future planning now essential thus to do, the Legislature having given by contract the entire city, may not sever the contract in Area "B" and donate to the Appellees. Appellant is perfectly willing for Appellee to have that which the State could lawfully donate after Appellant's rights hereinabove quoted specifically were conserved.

Admitting possible error, then arguendo:

(b) The Act, instead of taking away Appellant's rights, confirms them, in this, that Section 7716-05(b), alleged to have emasculated, is but a general provision and there is therein the last provision, Section 7716-38.

Admitting, as we most surely do not, that this Court and the Mississippi Court will determine contra to that said in (a), then surely let it be noted that Section 7716-05(b), whereunder the Commission and Mississippi's Court ousted Appellant from its constitutional rights and condemned it to desist from profitable operation in Area "B", is but a part of the Act and that the last section in the Act specifically thus provides, Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither

the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

In *United States* v. *Heinszen*, 206 U.S. 370, 382, 51 L. ed. 1098, 1102, this Court said:

"That where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary. * * *

"* * * * * * If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and (the power) to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the Maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.* Under the Constitution Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.'"

Quoting from *Mattingly* v. *District of Columbia*, 97 U.S. 687, 24 L. ed. 1098, 1099. See also *Vaughan* v. *Swayzie*, 56 Miss. 704. Appellant must have a dominant franchise throughout the municipality.

In this cause the Appellees were sole complainants and the State was not a party, as such, in either cause, nor subject to suit. Winona was never a party so that the decrees herein are as between the Appellees, Associations, and Appellant, the Power Company, res judicata; but as between the Appellant, the State and Winona res inter alios acta; and as to the State a nullity. *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 78 L. ed. 894; *Hansberry* v. *Lee*, 311 U.S. 32, 85 L. ed. 22.

This Court in *Arizona* v. *California*, ___ U.S. ___, 10 L. ed. 2d 542 had in mind certain appropriations that were beyond the apportioning power of the Secretary of the Interior, and therein quoted as apposite the statute. Footnote 87, p. 569:

> "87. 'Nothing . . . in (this Act) shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing . . . (herein) shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.' 43 USC §383 (1958)."

Compare *Head* v. *Board of Examiners*, ___ U.S. ___, 10 L. ed. 2d 983, Opinion Mr. Justice Brennan, p. 990, 996.

Note the Act contains the provision as to the certificate of convenience and necessity, Section 7716-05(b), and at

the same time, passed as a unit, it contains Section 7716-38. These two sections, inseparably integrated, must be judicially determined, *Coker* v. *Wilkinson*, 142 Miss. 1, 106 So. 886, and if absolutely irreconcilable, the Court said, p. 887:

> "* * * and that the latter clause being in conflict with the former and being the last expression of the Legislature on the subject, must stand and the former go down under the principle of law that, where there are two conflicting provisions in the same statute, the last expression of the Legislature must prevail over the former. Undoubtedly that principle of statutory construction is sound. * * *."

Craig v. *Walker*, 191 Miss. 424, 2 So. 2nd 806; 50 *Am. Jur.*, "Statutes", Section 365, p. 370; *Inglehart* v. *Inglehart*, 204 U.S. 478, 51 L. ed. 575; and supplementally, this Court said in *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208, 76 L. ed. 704, 708:

> "* * * General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. United States v. Chase, 135 U.S. 255, 260, 34 L. ed. 117, 119, 10 S. Ct. 756, 8 Am. Crim. Rep. 649. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * *. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. * * *."

Approved in *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 6 L. ed. 2d 72, 76.

Basically under the prior decisions here and in Mississippi, Appellant had contractual rights. When in 1956, this legislation was before the Legislature, the utilities were not either dead or dumb. They realized what was

upon them and that they must protect themselves as to their franchise under the Contract Clause; and that they so thus did, those here signing can as of knowledge state, and the terms of the Act so show. This protection is found in Section 7716-38. This Act recognizes that there may be utilities within the same municipality, but this section is a specific section, which, under settled law, constitutes an exception to the prior general provisions and as such makes this section the crux of this case:

> (1) "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, * * *."

But under the decisions of this Court and the Supreme Court of Mississippi, there was thereasto a contract, unimpairable, and when repeal by the State is attempted of a provision of a contract, so that there will be an impairment, that done by the State is a nullity. *Louisiana* v. *Pilsbury,* 105 U.S. 278, 301, 26 L. ed. 1090, 1098, wherein it is said:

> "The case of Von Hoffman v. Quincy, reported in 4th Wallace, 535 (71 U.S., XVIII., 403), is a leading one on this subject. The court there said: 'That when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound.'"

It is true, however, that Mississippi's Court did say, *Delta Electric Power Association* v. *Mississippi Power & Light Company,* Miss. , 149 So.2d 504, 513:

> "All of these statutes must be read together, and in the light of subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is in-

consistent with any of the former's provisions, *the Act modifies them.* * * *."

With deference, we defend our Court against the accusation that it was there assuming to act in contravention of the Contract Clause. It knew better and has revered that Clause. *Yazoo & M.V. R. Co.* v. *Adams*, 90 Miss. 559, 45 So. 91; *Wisconsin Lbr. C* v. *State*, 97 Miss. 571, 54 So. 247. And if this so be, then potentially reversal must be had with a remand to Mississippi's Court to delimit the State's interpretation of this statute, *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555, 4 L. ed. 2d 1397, so that if essential this Court may see clearly to pluck out the mote.

(2) "* * * but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, * * *."

It is perfectly obvious that these utilities in Mississippi with their monies invested, were vitally interested in the passage of this Act, and, with deference, saw no impairment therein or thereby under the nonexclusive contract of electric service within the municipality as it from time to time might be changed as to boundaries under the reserved power in *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; and *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110. Note that the Legislature diligently considered the matter as Mississippi's Court said and when they so did used in this section "repeal" and "passage", so as that there would be no possible contention, with deference, such as Mississippi's Court has assumed to raise up.

The first provision says that "neither the repeal of any such acts * * * shall affect any act done, or any cause

of action, whether in litigation or otherwise". Appellant was thoroughly conversant with that which began with Vicksburg and continued down until the passage of this Act and it will not be challenged by anyone that had it been dreamed that the effect of this Act was to impair the obligation of every franchise, every all-requirements contract, in every municipality in the State, there would have been the most violent protest at unsettling by impairment the basic conceptions that had persisted for nearly three-quarters of a century. The Court will see that the Legislature, notwithstanding the repeal of any act in conflict, then went further and stated that such repeal should not "affect any act done, or cause of action, whether in litigation or otherwise". This is extraordinary, but more extraordinary is the further declaration, "or any rights accruing, accrued or established prior to the effective date of this act". In *Arizona* v. *California*, U.S. , 10 L. ed. 2d 542, 553, this Court said:

> "* * * Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short-hand expression of this legal principle * * *."

"Qui prior est tempore, potior est jure", *Broom's Legal Maxims*, p. 362; 51 *C.J.* 297. Thus with the valid acceptance and erection of the facilities the State lost its potency to impair.

Note the further declaration "nor the passage of this act shall affect any act done or any cause of action, whether in litigation or otherwise". The pronoun "this" is all-inclusive and embraces every provision of the Act from its title to its approval. With deference, this language falls squarely within the reasoning of Mr. Jus-

tice Black in *United States* v. *Braverman*, ... U.S. ....., 10 L. ed. 2d 444; and any impairment of that specifically granted to the Appellant was as effectually condemned as was the rebate under the Interstate Commerce Act. It is essential, with deference, when the Legislature thus speaks, that the courts vouchsafe protection to those who have acted upon grants made by the State through the same appropriate words, as have been respected from time out of mind.

(3) Note, finally, Section 7716-38:

> "* * * or any rights accruing, accrued or established prior to the effective date of this act."

In 30 *C.J.S.* 1232, "Established" is thus defined:

> "* * * made definitely certain, settled unalterably, or made final beyond question or dispute in so far as any question can be settled in a court proceeding; purchased."

Wells Lamont Corporation v. *Bowles*, Em. App., 149 F.2d 364, 366, certiorari denied, 326 U.S. 730, 90 L. ed. 434; *District of Columbia* v. *Fleming*, C.A., D.C., 217 F.2d 18; *Walling* v. *Fred Wolferman, Inc.*, D.C. Mo., 54 F. Supp. 917.

Note further the words "any rights accruing, accrued". *United States* v. *Lindsay*, 346 U.S. 568, 98 L. ed. 300, 304. As at the date of the passage of the Act, all of the rights under this franchise to that moment are conceded to have existed, and but for the Act could have been enjoyed. Now, with this fixation of these rights accrued to the moment of the passage of this Act, the Legislature went further and used the participle "accruing"—rights accruing. Unquestionably, the contract franchise "hereafter" falls definitely within that term. *Spring City F. Co.* v. *Commissioner of Internal Revenue*, 292 U.S. 182, 78 L. ed. 1200, 1203; see, especially, *H. Liebes & Co.* v. *Com-*

missioner of Internal Revenue, C.A. 9, 90 F.2d 932, reviewing cases. See also *Grenada Bank* v. *Petty*, 174 Miss. 415, 164 So. 316; *United States* v. *St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 70 L. ed. 435; *Fullerton-Krueger Lbr. Co.* v. *Northern Pac. R. Co.*, 266 U.S. 435, 69 L. ed. 367; *United States* v. *Munro-Van Helms Co.*, C.A. 5, 243 F.2d 10, 12; 1 *C.J.S.*, "Accrue", p. 759.

Hereasto, that submitted certainly demands the exercise of the exclusive jurisdiction, especially because there being a contract, the State Legislature, under the holding of the Court, here divided the contract into two parts, leaving Appellant to be bound by and perform qua Area "A" and divested even a pretense of a right in Area "B"; and thereasto, substantially, with deference, so adjudged as that if Appellant passed over Appellee's Area "B" to perfect its electric connections, there would be a law violation. That demanded is as large a charter as the winds require within Winona until February 22, 1973; but arguendo that the Court should hold that naught has been said of sufficient moment to require a hearing on the merits and to that extent we stand defeated, yet like the village schoolmaster, we can argue still, and, with deference, accurately.

(c) An appropriate construction of Section 7716-05(b) is to be had whereby serious constitutional questions may be avoided, *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; and Section 7716-05(b), on its face, related exclusively to the future with Appellant's franchise dominant.

Section 7716-05 and Section 7716-05(b) of the Act definitely and expressly provide:

"No person shall construct, acquire, extend or operate equipment for * * * generating, transmitting or

MICRO CARD
TRADE MARK ®
22

PC 442

MATTHEW BENDER & COMPANY
MB
m-6-64
microcard

distributing * * * electricity, * * *, for any intrastate sale to or for the public for compensation, * * * without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

* * *

"(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or *operation then being conducted*, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; * * *."

Basically, these two sections must be construed by this Court so far as the Contract Clause is alleged to be impaired. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102. In construing the franchise possessed by Appellant hereinabove quoted in full, this Court must so construe this section of this Act, forgetting for the moment Section 7716-38, so as to make Appellant's the dominant franchise and Appellee's rights servient thereto. The admeasurement of these rights need not be herein made not being at issue. Confessedly the cases of *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771; *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167; and *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011, had been determined by the Supreme Court of Mississippi, and each of them had approved the grant made by the municipal boards under the authority of the State. *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155. Insofar as this Court went it assumed to regulate rates throughout the area under Sec-

tion 13 of the ordinance, both as it was when the grant was made and potentially after Vicksburg was in process of expanding. Appellant's system at Winona was owned and operated and the right thus to do was vouchsafed constitutionally until 1973. Appellant's contract to that extent has not been questioned by the State, qua State, or by Winona, and Appellee has no justiciable rights as to the areas not certificated to it. Grants by the State to Appellee, as well as to all other persons, are to be strictly construed in favor of the grantor. In *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 469, 50 L. ed. 1102, 1111, this Court said:

> "In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of this contract, it cannot be held to have done so by mere implication. * * *."

Citing *Knoxville Water Co.* v. *Knoxville*, 200 U.S. 22, 50 L. ed. 353.

As to the power of the Legislature to superimpose upon Appellant and its franchise rights a provision for an indeterminate future franchise, this Court has specifically made denial. *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204. The right of the State to amend Appellant's contract had to be specifically reserved. *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389. As to the franchise being at all

times co-extensive with the municipal boundaries, the law itself thus did under Section 3374-10; and, with the utmost deference, the Supreme Court of Mississippi completely missed the road laid down by this Court and all other Courts that when the boundaries of a municipality are extended or contracted and provision so made as that the State may legislate, all obligations are contemporaneously citywide, especially when so made as is herein done by explicit provision. Section 3374-10. Compare 37 *Am. Jur.*, "Municipal Corporation", Section 34, p. 651; 62 *C.J.S.*, "Municipal Corporations", Section 78, p. 186; *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 5, Sec. 1530, p. 129; *Pond on Public Utilities*, 4th Ed., Sec. 131, p. 316, *et seq.*

These authorities recognize, with deference (a) "Modus et conventio vincunt legem", Broom's Legal Maxims, p. 689, and that the Contract Clause exists and (b) that in the statutes "municipality" is synonymous with and must be read to include, unless prohibited, expansions and contractions. Such expansions or contractions are operative (a) eo instanti when made and (b) proprio vigore under the statutes. In certain decisions, this is exemplified thus, 13 *Am. & Eng. Anno. Cases* 137:

> "A municipality has power to contract by ordinance that a franchise granted shall be in force in the corporate limits of the city as they exist at the time of the passage of the ordinance or as they may thereafter be enlarged, for, if the ordinance were silent as to the territory thereafter taken into the city, the meaning would be the same. Truesdale v. Newport (Ky.) 90 S.W. 589."

So our respectful submission is that this Court must for itself determine whether the offer to contract with the State through its municipality, when accepted, became a contract binding the State as well as the municipality up

to the boundaries as they exist from day to day. That the State acted through the municipality in no wise diminished the obligatory effect of the contract. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341. Under *Yazoo City* v. *Lightcap*, 82 Miss. 148, 33 So. 949, Mississippi's Court recognized the propriety of allowing each municipality to contract so as to best promote its particular welfare—especially the future planning. Naught reasonably and appropriately granted to Appellee may be so construed as to oust Appellant from an area which, under settled law for three-quarters of a century, has been validly subject to legislation through the municipal agency when, as here, appositely delegated and appropriately ratified, to say nothing of the impropriety of Mississippi's Court taking Area "B" of the municipality and giving it gratuitously, and possibly contrary to Section 95, *Mississippi Constitution*, to Appellee. Thereasto in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 702, 4 L ed. 629, 675, Mr. Justice Story declared:

> "* * * This question cannot be answered in the affirmative until it is established, that the legislature may lawfully take the property of A and give it to B; * * *."

This litigation was most violent and involved many other issues, one of which took away from the municipalities the rich revenues potentially realizable through sale of the franchise.

Our submission is that under this jurisdictional statement, the basic contract provisions quoted hereinabove are valid as granted, but if perchance not so, then ratified specifically; and again, if perchance not so, then per se did not authorize the Commission to take from Appellant that which was its own and vest it in another gratuitously.

When these cases shall have been assigned to the docket, the foregoing segment will be incorporated in Appellant's brief and these decisions as to these provisions with deference, demonstrate mathematically that the Constitution has been turned into chaos.